

103
D.C. SUPREME COURT

Y 4.D 63/1:103-4

D.C. Supreme Court, Serial No. 103-... MARKUP
BEFORE THE
SUBCOMMITTEE ON JUDICIARY AND EDUCATION
AND THE
COMMITTEE ON
THE DISTRICT OF COLUMBIA
HOUSE OF REPRESENTATIVES
ONE HUNDRED THIRD CONGRESS
FIRST SESSION
ON
H.R. 1633
TO CREATE A SUPREME COURT FOR THE DISTRICT OF COLUMBIA

APRIL 28, AND JUNE 9, 1993

Serial No. 103-4

Printed for the use of the
Committee on the District of Columbia



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STAFF SUMMARY OF FINDINGS AND CONCLUSIONS

On June 16, 1993, the committee reported H.R. 1633 to the House by a vote of 7 yeas to 4 Nays. The committee report is House Report 103-176.

This volume includes the transcript of the 1-day hearing on April 28, 1993 by the Subcommittee on Judiciary and Education and the full committee markup on June 9, 1993, which commences on page 177. An appendix starts on page 269.

The bill, as reported, elevates the present nine members of the D.C. Court of Appeals to a new D.C. Supreme Court, at no increase in pay. Through attrition the Supreme Court would eventually have only seven members.

The President would nominate for confirmation by the Senate nine new members of the D.C. Court of Appeals from lists supplied by the D.C. Judicial Nomination Commission under present law. The District of Columbia would then have the three tier court system used in 39 States—two appellate courts and one trial court.

The new system will permit one full appellate court to decide important questions of District of Columbia law and an intermediate court, often meeting in three-judge panels, to review trial court and administrative agency decisions for error.

Several issues discussed in markup were considered in proposed amendments.

An amendment (on page 196) by Congresswoman Eleanor Holmes Norton held the pay for new justices of the D.C. Supreme Court at their present level—the rate prescribed by law for judges of the United States Court of Appeals. The amendment also set the salaries for judges on the D.C. Court of Appeals as midway between the new D.C. Supreme Court judges and the trial judges of the D.C. Court of Appeals as midway between the new D.C. Supreme Court judges and the trial judges of the D.C. Superior Court.

A substitute amendment by Congressman Ballenger (page 198) would have reduced the salaries for all three courts. Mr. Ballenger's amendment was defeated and Ms. Norton's amendment was approved.

A second improvement by Congresswoman Norton (page 207) which removed the authorization for Federal funds was approved (page 212).

A third amendment by Congresswoman Norton (page 213) adding a section to change the name of "hearing commissioners" to "judicial magistrates" and expanding their duties was approved (page 220).

An amendment by Congressman Ballenger (page 223) to require presidential appointment of the first members of the new D.C. Su-

preme Court rather than elevating the present members of the D.C. Court of Appeals was defeated (page 232).

An amendment by Congressman Saxton (page 233) creating an automatic bypass of the intermediate court for serious criminal cases and cases challenging the validity of a council act was defeated (page 244).

A substitute amendment by Congressman Bliley (page 251) would add two judges to the present D.C. Court of Appeals for a 5-year period. It was defeated (page 258).

H.R. 1633—D.C. SUPREME COURT BILL

Wednesday, April 28, 1993

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON JUDICIARY AND EDUCATION,
COMMITTEE ON DISTRICT OF COLUMBIA,
Washington, DC.

The subcommittee met, pursuant to call, at 10 a.m., in room 1310-A, Longworth House Office Building, Hon. Eleanor Holmes Norton (chairwoman of the subcommittee) presiding.

Members present: Representatives Norton, Stark, McDermott and Ballenger.

Majority staff present: Broderick D. Johnson, staff director; Dietra L. Ford, senior legislative associate; Marvin R. Eason, staff assistant; and Ronald C. Willis, subcommittee staff director.

Minority staff present: David E. Anderson, counsel; Richard T. Dykema and Matthew Farley, staff assistants.

William G. Wren, GPO publication specialist.

[The text of H.R. 1633 follows:]

103D CONGRESS
1ST SESSION

H. R. 1633

To create a Supreme Court for the District of Columbia, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

APRIL 1, 1993

Ms. NORTON introduced the following bill; which was referred to the Committee on the District of Columbia

A BILL

To create a Supreme Court for the District of Columbia,
and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "District of Columbia
5 Judicial Reorganization Act of 1993".

1 **TITLE I—SUPREME COURT OF** 2 **THE DISTRICT OF COLUMBIA**

3 **SEC. 101. ESTABLISHMENT OF SUPREME COURT OF THE** 4 **DISTRICT OF COLUMBIA.**

5 Title 11 of the District of Columbia Code is amended
 6 by adding after chapter 5 the following new chapter 6:
 7 **“CHAPTER 6. SUPREME COURT OF THE DISTRICT**
 8 **OF COLUMBIA.**

“SUBCHAPTER I. ESTABLISHMENT AND ORGANIZATION.

“Sec.

“11–601. Establishment; court of record; seal.

“11–602. Composition.

“11–603. Justices; service; compensation.

“11–604. Oath of justices.

“11–605. Term; hearings; quorum.

“11–606. Absence, disability, or disqualification of judges; vacancies.

“11–607. Assignment of justices and judges to and from other courts of
the District of Columbia.

“11–608. Clerks and secretaries for justices.

“11–609. Reports.

“SUBCHAPTER II. JURISDICTION.

“11–621. Certification to the Supreme Court of the District of Columbia.

“11–622. Review by the Supreme Court of the District of Columbia.

“11–623. Certification of questions of law.

“SUBCHAPTER III. MISCELLANEOUS PROVISIONS.

“11–641. Contempt powers.

“11–642. Oaths, affirmations, and acknowledgments.

“11–643. Rules of court.

“11–644. Judicial conference.

9 **“SUBCHAPTER I. ESTABLISHMENT AND** 10 **ORGANIZATION.**

11 **“§ 11–601. Establishment; court of record; seal.**

12 “(a) The Supreme Court of the District of Columbia
 13 (hereafter in this chapter referred to as ‘the court’) is

1 hereby established as a court of record in the District of
2 Columbia.

3 “(b) The court shall have a seal.

4 **“§ 11–602. Composition.**

5 The court shall consist of a chief justice and 6 associ-
6 ate justices.

7 **“§ 11–603. Justices; service; compensation.**

8 “(a) The chief justice and the justices of the court
9 shall serve in accordance with chapter 15 of this title.

10 “(b) Justices of the court shall be compensated at
11 90 percent of the rate prescribed by law for justices of
12 the United States Supreme Court. The chief justice shall
13 receive \$3,000 per year in addition to the salary of other
14 justices of the court.

15 **“§ 11–604. Oath of justices.**

16 “Each justice, when appointed, shall take the oath
17 prescribed for judges of courts of the United States.

18 **“§ 11–605. Term; hearings; quorum.**

19 “(a) The court shall sit in one term each year for
20 such period as it may determine.

21 “(b) The court shall sit in banc to hear and determine
22 cases and controversies, except that the court may sit in
23 divisions of 3 justices to hear and determine cases and
24 controversies certified for review under section 11–621 if
25 the court determines that subsection (b)(2) of such section

1 is the exclusive basis for such certification. The court in
2 banc for a hearing shall consist of the justices of the court
3 in regular active service.

4 “(c) A majority of the justices serving shall constitute
5 a quorum.

6 “(d) A rehearing before the court may be ordered by
7 a majority of the justices of the court in regular active
8 service. The court in banc for a rehearing shall consist
9 of the justices of the court in regular active service.

10 **“§ 11-606. Absence, disability, or disqualification of**
11 **justices; vacancies.**

12 “(a) When the chief justice of the court is absent or
13 disabled, the duties of the chief justice shall devolve upon
14 and be performed by such associate justice as the chief
15 justice may designate in writing. In the event that the
16 chief justice is (1) disqualified or suspended, or (2) unable
17 or fails to make such a designation, such duties shall de-
18 volve upon and be performed by the associate justices of
19 the court according to the seniority of their original com-
20 missions.

21 “(b) A chief justice whose term as chief justice has
22 expired shall continue to serve until redesignated or until
23 a successor has been designated. When there is a vacancy
24 in the position of chief justice the position shall be filled

1 temporarily as provided in the second sentence of sub-
2 section (a).

3 **“§ 11-607. Assignment of justices and judges to and**
4 **from other courts of the District of Co-**
5 **lumbia.**

6 “(a) Upon presentation of a certificate of necessity
7 by the chief judge of the District of Columbia Court of
8 Appeals, the chief justice of the Supreme Court of the Dis-
9 trict of Columbia may designate and assign temporarily
10 one or more justices of the Supreme Court of the District
11 of Columbia or one or more judges of the Superior Court
12 of the District of Columbia to serve on the District of Co-
13 lumbia Court of Appeals or a division thereof whenever
14 the business of the District of Columbia Court of Appeals
15 so requires. Such designations or assignments shall be in
16 conformity with the rules or orders of the District of Co-
17 lumbia Court of Appeals.

18 “(b) Upon presentation of a certificate of necessity
19 by the chief judge of the Superior Court of the District
20 of Columbia, the chief justice of the Supreme Court of
21 the District of Columbia may designate and assign tempo-
22 rarily one or more justices of the Supreme Court of the
23 District of Columbia or one or more judges of the District
24 of Columbia Court of Appeals to serve as a judge of the
25 Superior Court of the District of Columbia.

1 **“§ 11–608. Clerks and secretaries for justices.**

2 “Each justice may appoint and remove a personal
3 secretary. The chief justice may appoint and remove not
4 more than three personal law clerks, and each associate
5 justice may appoint and remove not more than two per-
6 sonal law clerks. In addition, the chief justice may appoint
7 and remove law clerks for the court and law clerks and
8 secretaries for the senior justices. The law clerks ap-
9 pointed for the court shall serve as directed by the chief
10 justice.

11 **“§ 11–609. Reports.**

12 “Each justice shall submit to the chief justice such
13 reports and data as the chief justice may request.

14 **“SUBCHAPTER II. JURISDICTION.**

15 **“§ 11–621. Certification to the Supreme Court of the**
16 **District of Columbia.**

17 “(a) In any case or class of cases in which an appeal
18 has been taken to or filed with the District of Columbia
19 Court of Appeals, the Supreme Court of the District of
20 Columbia, by order of the Supreme Court sua sponte, or,
21 in its discretion, on motion of the District of Columbia
22 Court of Appeals or of any party, may certify the case
23 or class of cases for review by the Supreme Court before
24 it has been determined by the District of Columbia Court
25 of Appeals. The effect of such certification shall be to
26 transfer jurisdiction over the case or class of cases to the

1 Supreme Court of the District of Columbia for all pur-
2 poses.

3 “(b) Such certification may be made only if not less
4 than 3 of the justices of the Supreme Court of the District
5 of Columbia determine that—

6 “(1) the case or class of cases involves a ques-
7 tion that is novel or difficult or is of importance in
8 the general public interest or the administration of
9 justice; or

10 “(2) the case or class of cases was pending in
11 the District of Columbia Court of Appeals on the ef-
12 fective date of this section and, because the justices
13 of the Supreme Court of the District of Columbia
14 were familiar with the case or class of cases while
15 serving as judges of the District of Columbia Court
16 of Appeals, the sound and efficient administration of
17 justice dictates that the case or class of cases be cer-
18 tified for review by the Supreme Court of the Dis-
19 trict of Columbia.

20 **“§ 11-622. Review by the Supreme Court of the Dis-**
21 **trict of Columbia.**

22 “(a) Any party aggrieved by a final decision of the
23 District of Columbia Court of Appeals may petition the
24 Supreme Court of the District of Columbia for an appeal.
25 Such a petition may be granted and appeal be heard by

1 the Supreme Court of the District of Columbia only upon
2 the affirmative vote of not less than 3 of the justices that
3 the matter involves a question that is novel or difficult,
4 is the subject of conflicting authorities within the jurisdic-
5 tion, or is of importance in the general public interest or
6 the administration of justice. The granting of such peti-
7 tions for appeal shall be in the discretion of the Supreme
8 Court of the District of Columbia. The Supreme Court
9 of the District of Columbia shall not be required to state
10 reasons for denial of petitions for appeal.

11 “(b) On hearing an appeal in any case or controversy,
12 the Supreme Court of the District of Columbia shall give
13 judgment after an examination of the record without re-
14 gard to errors or defects which do not affect the substan-
15 tial rights of the parties.

16 **“§ 11-623. Certification of questions of law.**

17 “(a) The Supreme Court of the District of Columbia
18 may answer a question of law of the District of Columbia
19 certified to it by the Supreme Court of the United States,
20 a Court of Appeals of the United States, or the highest
21 appellate court of any State, if—

22 “(1) such question of law may be determinative
23 of the case pending in such a court; and

24 “(2) there is no controlling precedent regarding
25 such question of law in the decisions of the District

1 of Columbia Court of Appeals or the Supreme Court
2 of the District of Columbia.

3 “(b) This section may be invoked by an order of any
4 of the courts referred to in subsection (a) upon such
5 court’s motion or upon the motion of any party to the
6 case.

7 “(c) A certification order under this section shall—

8 “(1) describe the question of law to be an-
9 swered;

10 “(2) contain a statement of all facts relevant to
11 the question certified and the nature of the con-
12 troversy in which the questions arose; and

13 “(3) upon the request of the Supreme Court of
14 the District of Columbia contain the original or cop-
15 ies of the record of the case in question or of any
16 portion of such record as the Supreme Court of the
17 District of Columbia considers necessary to deter-
18 mine the questions of law which are the subject of
19 the motion.

20 “(d) Fees and costs shall be the same as in appeals
21 docketed before the Supreme Court of the District of Co-
22 lumbia and shall be equally divided between the parties
23 unless precluded by statute or by order of the certifying
24 court.

1 “(e) The written opinion of the Supreme Court of the
2 District of Columbia stating the law governing any ques-
3 tions certified under subsection (a) shall be sent by the
4 clerk to the certifying court and to the parties.

5 “(f) The Supreme Court of the District of Columbia,
6 on its own motion, the motion of the District of Columbia
7 Court of Appeals, or the motion of any party to a case
8 pending in the Supreme Court of the District of Columbia
9 or the District of Columbia Court of Appeals, may order
10 certification of a question of law of another State to the
11 highest court of such State if, in the view of the Supreme
12 Court of the District of Columbia—

13 “(1) such question of law may be determinative
14 of the case pending in the Supreme Court of the
15 District of Columbia or the District of Columbia
16 Court of Appeals; and

17 “(2) there is no controlling precedent regarding
18 such question of law in the decisions of the appellate
19 courts of the State to which the order of certification
20 is directed.

21 “(g) The Supreme Court of the District of Columbia
22 may prescribe the rules of procedure concerning the an-
23 swering and certification of questions of law under this
24 section.

1 “SUBCHAPTER III. MISCELLANEOUS
2 PROVISIONS.

3 **“§ 11-641. Contempt powers.**

4 “In addition to the powers conferred by section 402
5 of title 18, United States Code, the Supreme Court of the
6 District of Columbia, or a justice thereof, may punish for
7 disobedience of an order or for contempt committed in the
8 presence of the court.

9 **“§ 11-642. Oaths, affirmations, and acknowledgments.**

10 “Each justice of the Supreme Court of the District
11 of Columbia and each employee of the court authorized
12 by the chief justice may administer oaths and affirmations
13 and take acknowledgments.

14 **“§ 11-643. Rules of court.**

15 “The Supreme Court of the District of Columbia
16 shall conduct its business in accordance with such rules
17 and procedures as the court shall adopt.

18 **“§ 11-644. Judicial conference.**

19 “The chief justice of the Supreme Court of the Dis-
20 trict of Columbia shall summon annually the justices and
21 active judges of the District of Columbia courts to a con-
22 ference at a time and place that the chief justice des-
23 ignates, for the purpose of advising as to means of improv-
24 ing the administration of justice within the District of Co-
25 lumbia. The chief justice shall preside at such conference

1 which shall be known as the Judicial Conference of the
 2 District of Columbia. Each justice and judge summoned,
 3 unless excused by the chief justice of the Supreme Court
 4 of the District of Columbia, shall attend throughout the
 5 conference. The Supreme Court of the District of Colum-
 6 bia shall provide by its rules for representation of and ac-
 7 tive participation by members of the unified District of
 8 Columbia Bar and other persons active in the legal profes-
 9 sion at such conference.”.

10 **SEC. 102. TRANSITION PROVISIONS.**

11 (a) **ELEVATION OF JUDGES OF THE DISTRICT OF CO-**
 12 **LUMBIA COURT OF APPEALS AS JUSTICES OF THE SU-**
 13 **PREME COURT OF THE DISTRICT OF COLUMBIA.—**

14 (1) Except as provided in paragraph (2), begin-
 15 ning on the effective date of this title the chief judge
 16 of the District of Columbia Court of Appeals shall
 17 serve the remainder of the term to which he or she
 18 was appointed as the chief justice of the Supreme
 19 Court of the District of Columbia and the associate
 20 judges of the District of Columbia Court of Appeals
 21 shall serve the remainder of the respective terms to
 22 which they were appointed as associate justices of
 23 the Supreme Court of the District of Columbia. The
 24 Supreme Court of the District of Columbia shall
 25 conform to the numerical requirements of section

1 11-602 of the D.C. Code through attrition. Vacan-
2 cies in the offices of chief judge and associate judge
3 of the District of Columbia Court of Appeals shall
4 be filled in accordance with chapter 15 of title 11 of
5 the D.C. Code.

6 (2) Any judge of the District of Columbia Court
7 of Appeals may serve the remainder of the term to
8 which he or she was appointed as a judge of that
9 court by providing written notice to the chief judge
10 of the District of Columbia Court of Appeals not less
11 than 30 days after the date of the enactment of this
12 Act.

13 (b) TRANSITION PERIOD FOR THE SUPREME COURT
14 OF THE DISTRICT OF COLUMBIA.—

15 (1) A committee consisting of the chief judge of
16 the District of Columbia Court of Appeals together
17 with 2 other judges of such court and the chief
18 judge of the Superior Court of the District of Co-
19 lumbia together with 2 other judges of such court
20 shall be responsible for the administration of the pe-
21 riod of transition prior to the establishment of the
22 Supreme Court of the District of Columbia, includ-
23 ing the hiring of necessary staff, the preparation of
24 facilities, and the purchase of necessary equipment
25 and supplies.

(2) Not more than 120 days after the date of the enactment of this Act, the committee referred to in paragraph (1) shall submit to the Subcommittee on Government Efficiency, Federalism, and the District of Columbia of the Committee on Governmental Affairs of the Senate and the Committee on the District of Columbia of the House of Representatives a transition report, consistent with this Act, regarding the establishment of the Supreme Court of the District of Columbia and the filling of vacancies on the District of Columbia Court of Appeals resulting from the elevation of the judges of such Court to positions on the Supreme Court of the District of Columbia pursuant to subsection (a).

(3) This subsection shall take effect on the date of the enactment of this Act.

SEC. 103. CONFORMING AND OTHER AMENDMENTS.

(a) AMENDMENTS TO THE HOME RULE ACT.—

(1) Section 431(a) of the District of Columbia Self-Government and Governmental Reorganization Act is amended—

(A) in the first sentence by inserting “Supreme Court of the District of Columbia,” after “vested in the”; and

1 (B) by adding after the fourth sentence the
2 following: "The Supreme Court of the District
3 of Columbia has jurisdiction of appeals from
4 the District of Columbia Court of Appeals and
5 of cases certified to the Supreme Court under
6 section 11-621(a), District of Columbia Code."

7 (2) Section 431 of such Act is further amended
8 in subsections (b), (c), and (g)—

9 (A) by inserting "chief justice or" before
10 "chief judge" each place it appears;

11 (B) by inserting "justice or" before
12 "judge" each place it appears;

13 (C) by inserting "justices or" before
14 "judges" each place it appears; and

15 (D) by inserting "chief justice's or" before
16 "chief judge's" each place it appears.

17 (3) Section 432 of such Act is amended—

18 (A) by inserting "justice or" before
19 "judge" each place it appears;

20 (B) by striking "District of Columbia
21 Court of Appeals" each place it appears and in-
22 serting "Supreme Court of the District of Co-
23 lumbia"; and

24 (C) in subsection (a)(1) by striking "law or
25 which would be a felony in the District" and in-

1 serting “law or the laws of the District of Co-
2 lumbia”.

3 (4) Section 433 of such Act is amended—

4 (A) in the heading by inserting “JUSTICES
5 AND” before “JUDGES”;

6 (B) by inserting “justices and” before
7 “judges” each place it appears; and

8 (C) by inserting “justice or” before
9 “judge” each place it appears.

10 (5) Section 434 of such Act is amended in sub-
11 sections (b)(3) and (d)—

12 (A) by inserting “justice or” before
13 “judge” each place it appears;

14 (B) by inserting “justices or” before
15 “judges” each place it appears; and

16 (C) by inserting “justice’s or” before
17 “judge’s” each place it appears.

18 (b) AMENDMENTS TO CHAPTER 1 OF TITLE 11, D.C.
19 CODE.—

20 (1) Section 11–101(2), D.C. Code, is amended
21 by redesignating subparagraphs (A) and (B) as sub-
22 paragraphs (B) and (C), respectively, and by adding
23 before subparagraph (B) (as so redesignated) the
24 following:

1 “(A) The Supreme Court of the District of Co-
2 lumbia.”.

3 (2) Section 11-102, D.C. Code, is amended to
4 read as follows:

5 **“§ 11-102. Status of Supreme Court of the District of**
6 **Columbia.**

7 “The highest court of the District of Columbia is the
8 Supreme Court of the District of Columbia. Final judg-
9 ments, orders, and decrees of the Supreme Court of the
10 District of Columbia and of the District of Columbia
11 Court of Appeals where review is denied by the Supreme
12 Court of the District of Columbia are reviewable by the
13 Supreme Court of the United States in accordance with
14 section 1257 of title 28, United States Code.”.

15 (3) The item relating to section 11-102 of the
16 table of contents of chapter 1 of title 11, D.C. Code,
17 is amended to read as follows:

 “11-102. Status of Supreme Court of the District of Columbia.”.

18 (c) AMENDMENTS TO CHAPTER 7 OF TITLE 11, D.C.
19 CODE.—

20 (1) Chapter 7 of title 11, D.C. Code, is amend-
21 ed by striking sections 11-707, 11-723, and 11-744
22 and by striking the items relating to such sections
23 in the table of contents of such chapter.

24 (2) Section 11-703(b), D.C. Code, is amended
25 by striking “\$500” and inserting “\$2,500”.

1 (3) Section 11-708, D.C. Code, is amended by
2 striking “not more than three law clerks for the
3 court.” and inserting “law clerks for the court and
4 law clerks and secretaries for the senior judges.”.

5 (4) Section 11-722, D.C. Code, is amended by
6 striking “Commissioner” and inserting “Mayor”.

7 (5) Section 11-743, D.C. Code, is amended by
8 striking “according to” and all that follows and in-
9 serting “in accordance with such rules and proce-
10 dures as it may adopt.”.

11 (d) AMENDMENTS TO CHAPTER 9 OF TITLE 11, D.C.
12 CODE.—

13 (1) Section 11-904(b), D.C. Code, is amended
14 by striking “\$500” and inserting “\$2,500”.

15 (2) Section 11-908(b), D.C. Code, is amended
16 to read as follows:

17 “(b) When the business of the Superior Court re-
18 quires, the chief judge may certify to the chief justice of
19 the Supreme Court of the District of Columbia the need
20 for an additional judge or judges as provided in section
21 11-607 and 11-707.”.

22 (3) Section 11-910, D.C. Code, is amended by
23 adding at the end the following new sentence: “In
24 addition, the chief judge may appoint and remove

1 law clerks for the court, who shall serve as directed
2 by the chief judge.”.

3 (4) Section 11-946, D.C. Code, is amended by
4 striking “District of Columbia Court of Appeals”
5 each place it appears in the second and third sen-
6 tences and inserting “Supreme Court of the District
7 of Columbia”.

8 (e) AMENDMENTS TO CHAPTER 15 OF TITLE 11,
9 D.C. CODE.—

10 (1) Section 11-1501, D.C. Code, is amended to
11 read as follows:

12 **“§ 11-1501. Appointment and qualifications of judges.**

13 “(a) Except as provided in section 434(d)(1) of the
14 District of Columbia Self-Government and Governmental
15 Reorganization Act, the President shall nominate, from
16 the list of persons recommended by the District of Colum-
17 bia Judicial Nomination Commission established under
18 section 434 of such Act, and, by and with the advice and
19 consent of the Senate, appoint all justices and judges of
20 the District of Columbia courts.

21 “(b) No person may be nominated or appointed a jus-
22 tice or judge of a District of Columbia court unless that
23 person—

24 “(1) is a citizen of the United States;

1 “(2) is an active member of the unified District
2 of Columbia Bar and has been engaged in the active
3 practice of law in the District for the five years im-
4 mediately preceding nomination or for such five
5 years has served as a judge of the United States or
6 the District of Columbia, has been on the faculty of
7 a law school in the District, or has been employed
8 as a lawyer by the United States or the District of
9 Columbia government;

10 “(3) is a bona fide resident of the District of
11 Columbia and has maintained an actual place of
12 abode in the District for at least 90 days imme-
13 diately prior to nomination, and shall retain such
14 residency as long as he or she serves as such judge,
15 except judges appointed prior to December 23,
16 1973, who retain residency in Montgomery or Prince
17 Georges Counties in Maryland, Arlington or Fairfax
18 Counties (or any cities within the outer boundaries
19 thereof) or the city of Alexandria in Virginia shall
20 not be required to be residents of the District to be
21 eligible for reappointment or to serve any term to
22 which reappointed;

23 “(4) is recommended to the President, for such
24 nomination and appointment, by the District of Co-
25 lumbia Judicial Nomination Commission; and

1 “(5) has not served, within a period of 2 years
2 prior to nomination, as a member of the District of
3 Columbia Commission on Judicial Disabilities and
4 Tenure or of the District of Columbia Judicial Nom-
5 ination Commission.”.

6 (2) Section 11-1504(a)(1), D.C. Code, is
7 amended by striking the period at the end of the
8 first sentence and inserting the following: “, except
9 that a retired judge may not serve or perform judi-
10 cial duties on the Supreme Court of the District of
11 Columbia.”.

12 (3) Section 11-1505(a), D.C. Code, is amended
13 in the second sentence by striking “District” and all
14 that follows and inserting “court of the District of
15 Columbia on which the judge serves.”.

16 (4) Subchapter I of chapter 15 of title 11, D.C.
17 Code, is amended by adding at the end the following
18 new section:

19 **“§ 11-1506. Definitions.**

20 **“For purposes of this chapter—**

21 “(1) the term ‘judge’ means any justice of the
22 Supreme Court of the District of Columbia, or any
23 judge of the District of Columbia Court of Appeals
24 or the Superior Court; and

“(2) the term ‘chief judge’ means the chief justice of the Supreme Court of the District of Columbia, or the chief judges of the District of Columbia Court of Appeals or the Superior Court, as appropriate.”.

(5) Section 11-1526, D.C. Code, is amended by striking “District of Columbia Court of Appeals” each place it appears and inserting “Supreme Court of the District of Columbia”.

(6) Section 11-1528, D.C. Code, is amended in subsection (a)(2)(C) by inserting “the Supreme Court of the District of Columbia or” after “elevation to”.

(7) Section 11-1529, D.C. Code, is amended by striking “District of Columbia Court of Appeals” and inserting “Supreme Court of the District of Columbia”.

(8) Section 11-1561, D.C. Code, is amended—

(A) in paragraph (1), by inserting “any justice of the Supreme Court of the District of Columbia,” before “any judge”; and

(B) in paragraph (2), by inserting “a justice in the Supreme Court of the District of Columbia,” before “a judge”.

1 (9) The table of sections for subchapter I of
 2 chapter 15 of title 11, D.C. Code, is amended by
 3 adding at the end the following:

“11-1506. Definitions.”.

4 (f) AMENDMENTS TO CHAPTER 17 OF TITLE 11,
 5 D.C. CODE.—

6 (1) Section 11-1701, D.C. Code, is amended—

7 (A) by amending subsection (a) to read as
 8 follows:

9 “(a) There shall be a Joint Committee on Judicial
 10 Administration in the District of Columbia (hereafter in
 11 this chapter referred to as the ‘Joint Committee’) consist-
 12 ing (during the first 3 fiscal years that begin after the
 13 date of the enactment of the District of Columbia Judicial
 14 Reorganization Act of 1993) of the chief justice of the Su-
 15 preme Court of the District of Columbia (who shall serve
 16 as chairperson) and two other justices of such court, the
 17 chief judge of the District of Columbia Court of Appeals,
 18 and the chief judge of the Superior Court of the District
 19 of Columbia and two additional judges of such court.”;

20 (B) in subsection (b)—

21 (i) by amending paragraph (4) to read
 22 as follows:

23 “(4) Preparation and publication of an annual
 24 report of the District of Columbia court system re-
 25 garding the work of the courts, the performance of

1 the duties enumerated in this chapter, and any rec-
 2 ommendations relating to the courts.”, and

3 (ii) by striking paragraphs (6) and (9)
 4 and redesignating paragraphs (7) and (8)
 5 as paragraphs (6) and (7); and
 6 (C) in subsection (c)—

7 (i) by amending paragraph (2) to read
 8 as follows:

9 “(2) formulate and enforce standards for out-
 10 side activities of and receipt of compensation by the
 11 judges of the District of Columbia court system;”,

12 (ii) in paragraph (3), by striking “,
 13 and institute such changes” and all that
 14 follows through “justice”,

15 (iii) by striking “and” at the end of
 16 paragraph (3),

17 (iv) by striking the period at the end
 18 of paragraph (4) and inserting a semi-
 19 colon, and

20 (v) by adding at the end the following
 21 new paragraphs:

22 “(5) submit the annual budget requests of the
 23 Supreme Court of the District of Columbia, the Dis-
 24 trict of Columbia Court of Appeals, and the Superior
 25 Court to the Mayor of the District of Columbia as

1 part of the integrated budget of the District of Co-
 2 lumbia court system, except that any such request
 3 may be modified upon the concurrence of 5 of the
 4 7 members of the Joint Committee; and

5 “(6) with the concurrence of the chief justice of
 6 the Supreme Court of the District of Columbia and
 7 the respective chief judges of the other District of
 8 Columbia courts, prepare and implement other poli-
 9 cies and practices for the District of Columbia court
 10 system and resolve other matters which may be of
 11 joint and mutual concern of the Supreme Court of
 12 the District of Columbia, the District of Columbia
 13 Court of Appeals, and the Superior Court.”.

14 (2) Section 11-1702, D.C. Code, is amended—

15 (A) in the heading, by inserting “**the**
 16 **chief justice and the**” after “**of**”;

17 (B) by redesignating subsections (a) and
 18 (b) as subsections (b) and (c); and

19 (C) by inserting before subsection (b) the
 20 following new subsection:

21 “(a) The chief justice of the Supreme Court of the
 22 District of Columbia, in addition to the authority con-
 23 ferred by chapter 6 of this title, shall supervise the inter-
 24 nal administration of that court—

1 “(1) including all administrative matters other
2 than those within the responsibility enumerated in
3 section 11-1701(b), and

4 “(2) including the implementation in that court
5 of the matters enumerated in section 11-1701(b),
6 consistent with the general policies and directives of the
7 Joint Committee.”.

8 (3) Section 11-1703(a), D.C. Code, is
9 amended—

10 (A) by striking “He” each place it appears
11 and inserting “The Executive Officer”; and

12 (B) in the fourth sentence, by striking
13 “judges” and inserting “judge of the District of
14 Columbia Court of Appeals and the chief judge
15 of the Superior Court of the District of Colum-
16 bia”.

17 (4) Section 11-1721, D.C. Code, is amended by
18 amending the matter following the heading to read
19 as follows:

20 “(a) The Supreme Court of the District of Columbia
21 shall have a clerk appointed by the chief justice of that
22 court who shall, under the direction of the chief justice,
23 be responsible for the daily operations of that court and
24 serve as the clerk of the District of Columbia Court of
25 Appeals.

1 “(b) The Superior Court of the District of Columbia
2 shall have a clerk appointed by the chief judge of that
3 court who shall, under the direction of the chief judge,
4 be responsible for the daily operations of that court.

5 “(c) Each such clerk appointed under this section
6 shall receive a level of compensation, including retirement
7 benefits, determined by the Joint Committee on Judicial
8 Administration, except that such level may not exceed the
9 level of compensation provided for the Executive Officer.”.

10 (5) Section 11-1730(a), D.C. Code, is
11 amended—

12 (A) by striking “Judges” and inserting
13 “Justices and judges”;

14 (B) by inserting “11-609,” after “sec-
15 tions”; and

16 (C) by inserting “chief justice or” after
17 “respective”.

18 (6) Section 11-1731, D.C. Code, is amended—

19 (A) by striking “or the chief judge” and
20 inserting “, the chief justice, or the chief
21 judges”;

22 (B) in paragraph (7), by striking “the Dis-
23 trict of Columbia Bail Agency” and inserting
24 “the District of Columbia Pre-trial Services
25 Agency”;

1 (C) by inserting “and” at the end of para-
2 graph (9); and

3 (D) by striking paragraphs (10) and (11)
4 and inserting the following:

5 “(10) the Department of Human Services.”.

6 (7) Section 11-1741, D.C. Code, is amended—

7 (A) by amending the matter preceding
8 paragraph (1) to read as follows: “Within the
9 District of Columbia courts, and subject to the
10 supervision of the chief justice of the Supreme
11 Court of the District of Columbia (acting in
12 consultation with the chief judge of the District
13 of Columbia Court of Appeals and the chief
14 judge of the Superior Court of the District of
15 Columbia), the Executive Officer shall—”;

16 (B) by inserting “chief justice or” before
17 “chief” each place it appears in paragraphs (5),
18 (7), and (9);

19 (C) by striking “and” at the end of para-
20 graph (8);

21 (D) by striking the period at the end of
22 paragraph (9) and inserting “; and”; and

23 (E) by adding at the end the following:

24 “(10) be responsible for the allocation, negotia-
25 tion for, and provision of space in the courts.”.

1 (8) Section 11-1745(b)(2), D.C. Code, is
2 amended by striking "Commissioner" and inserting
3 "Mayor".

4 (9) Section 11-1747, D.C. Code, is amended by
5 striking "him" and inserting "the Executive Offi-
6 cer".

7 (10) The table of sections for subchapter I of
8 chapter 17 of title 11, D.C. Code, is amended by
9 amending the item relating to section 11-1702 to
10 read as follows:

"11-1702. Responsibilities of the chief justice and the chief judges in the re-
spective courts."

11 (g) AMENDMENTS TO CHAPTER 25 OF TITLE 11,
12 D.C. CODE.—

13 (1) Section 11-2501, D.C. Code, is amended—

14 (A) by striking "District of Columbia
15 Court of Appeals" each place it appears and in-
16 serting "Supreme Court of the District of
17 Columbia"; and

18 (B) by amending subsection (c) to read as
19 follows:

20 "(c) Members of the bar of the District of Columbia
21 Court of Appeals in good standing on the effective date
22 of title I of the District of Columbia Judicial Reorganiza-
23 tion Act of 1993 shall be automatically enrolled as mem-
24 bers of the bar of the Supreme Court of the District of

1 Columbia, and shall be subject to its disciplinary jurisdic-
2 tion.”.

3 (2) Section 11-2502, D.C. Code, is amended by
4 striking “District of Columbia Court of Appeals”
5 and inserting “Supreme Court of the District of
6 Columbia”.

7 (3) Section 11-2503, D.C. Code, is amended by
8 striking “District of Columbia Court of Appeals”
9 and inserting “Supreme Court of the District of
10 Columbia”.

11 (4) Section 11-2504, D.C. Code, is amended by
12 striking “District of Columbia Court of Appeals”
13 and inserting “other courts of the District of Colum-
14 bia”.

15 (h) AMENDMENT TO CHAPTER 26 OF TITLE 11, D.C.
16 CODE.—Section 11-2607, D.C. Code, is amended by
17 striking “Commissioner” and inserting “Mayor”.

18 (i) AMENDMENT TO CHAPTER 3 OF TITLE 13, D.C.
19 CODE.—Section 13-302, D.C. Code, is amended by insert-
20 ing “the Supreme Court of the District of Columbia,”
21 after “process of”.

22 (j) AMENDMENTS TO CHAPTER 3 OF TITLE 17, D.C.
23 CODE.—

24 (1) The chapter heading for chapter 3 of title
25 17, D.C. Code, is amended to read as follows: “SU-

1 PREME COURT OF THE DISTRICT OF COLUMBIA AND
2 DISTRICT OF COLUMBIA COURT OF APPEALS.”.

3 (2) Section 17–302, D.C. Code, is amended by
4 striking “District of Columbia Court of Appeals”
5 each place it appears and inserting “Supreme Court
6 of the District of Columbia”.

7 (3) Section 17–305, D.C. Code, is amended by
8 adding at the end the following new subsection:

9 “(c) The Supreme Court of the District of Columbia
10 shall apply the same standards regarding the scope of re-
11 view and the reversal of judgment as the District of Co-
12 lumbia Court of Appeals applies under subsections (a) and
13 (b).”.

14 (4) Section 17–306, D.C. Code, is amended by
15 inserting “Supreme Court of the District of Colum-
16 bia or the” before “District”.

17 (k) AMENDMENT TO TITLE 5, UNITED STATES
18 CODE.—Section 5102(c)(4) of title 5, United States Code,
19 is amended by striking “the chief judges” and inserting
20 “the chief justice and the associate justices of the Su-
21 preme Court of the District of Columbia and the chief
22 judges”.

23 (l) AMENDMENTS TO TITLE 18, UNITED STATES
24 CODE.—(1) Section 3006A(k) of title 18, United States
25 Code, is amended in the second sentence by striking “the

1 Superior Court” and all that follows and inserting “the
 2 Supreme Court of the District of Columbia, the District
 3 of Columbia Court of Appeals, or the Superior Court of
 4 the District of Columbia.”.

5 (2) Section 6001(4) of title 18, United States Code,
 6 is amended by inserting “the Supreme Court of the Dis-
 7 trict of Columbia,” before “the District of Columbia Court
 8 of Appeals,”.

9 (m) AMENDMENTS TO TITLE 28, UNITED STATES
 10 CODE.—(1) Section 1257(b) of title 28, United States
 11 Code, is amended by striking “District of Columbia Court
 12 of Appeals” and inserting “Supreme Court of the District
 13 of Columbia”.

14 (2) Section 2113 of title 28, United States Code, is
 15 amended by striking “District of Columbia Court of Ap-
 16 peals” and inserting “Supreme Court of the District of
 17 Columbia”.

18 **SEC. 104. AUTHORIZATION OF APPROPRIATIONS.**

19 (a) IN GENERAL.—In addition to any other sums au-
 20 thorized to be appropriated to the District of Columbia,
 21 there are authorized to be appropriated to the District of
 22 Columbia for costs incurred by the District of Columbia
 23 in implementing the amendments made by sections 101
 24 and 103 and in carrying out section 102 the following
 25 amounts:

1 (1) \$1,200,000 for fiscal year 1994.

2 (2) \$5,000,000 for fiscal year 1995.

3 (3) \$4,000,000 for fiscal year 1996.

4 (4) \$3,000,000 for fiscal year 1997.

5 (5) \$2,000,000 for fiscal year 1998.

6 (6) \$1,000,000 for fiscal year 1999.

7 (b) AVAILABILITY OF FUNDS.—Funds appropriated
8 pursuant to the authorization referred to in subsection (a)
9 shall remain available to the District of Columbia until
10 expended.

11 **SEC. 105. EFFECTIVE DATE.**

12 Except as provided in section 102, this title and the
13 amendments made by this title shall take effect 6 months
14 after the date of enactment of this Act.

15 **TITLE II—JUDGES OF THE DIS-**
16 **TRICT OF COLUMBIA COURTS**

17 **SEC. 201. DESIGNATION OF CHIEF JUDGE.**

18 Section 11–1503(a), D.C. Code, is amended to read
19 as follows:

20 “(a)(1) Except as provided in paragraph (2), the
21 chief justice or chief judge of a District of Columbia court
22 shall be designated by the District of Columbia Judicial
23 Nomination Commission from among the judges of the
24 court in regular active service. A chief judge shall serve
25 for a term of 4 years or until a successor is designated,

1 and shall be eligible for redesignation. A judge may relin-
 2 quish the position of chief judge, after giving notice to the
 3 District of Columbia Judicial Nomination Commission.

4 “(2) Notwithstanding the first sentence of paragraph
 5 (1), the first chief justice of the Supreme Court of the
 6 District of Columbia shall be appointed in accordance with
 7 section 102(a) of the District of Columbia Judicial Reor-
 8 ganization Act of 1993.”.

9 **SEC. 202. COMPOSITION OF SUPERIOR COURT OF THE DIS-**
 10 **TRICT OF COLUMBIA.**

11 Section 11-903, D.C. Code, is amended—

12 (1) effective October 1, 1993, by striking “fifty-
 13 eight” and inserting “sixty”; and

14 (2) effective October 1, 1994, by striking
 15 “sixty” and inserting “sixty-two”.

16 **SEC. 203. STUDY OF FEASIBILITY OF ESTABLISHING DIS-**
 17 **TRICT OF COLUMBIA NIGHT COURT.**

18 (a) STUDY.—The Executive Officer of the District of
 19 Columbia courts shall conduct a study of the feasibility
 20 and desirability of establishing a District of Columbia
 21 Night Court as a division of the Superior Court of the
 22 District of Columbia.

23 (b) REPORT.—Not later than 120 days after the date
 24 of the enactment of this Act, the Executive Officer shall
 25 submit a report on the study conducted under subsection

1 (a) to the Joint Committee on Judicial Administration in
2 the District of Columbia, which shall forward the study
3 together with any comments and recommendations to Con-
4 gress not later than 180 days after the date of the enact-
5 ment of this Act.

6 **SEC. 204. EFFECTIVE DATE.**

7 Except as provided in section 202, the amendments
8 made by sections 201 and 202 shall take effect on the
9 date of the enactment of this Act.

10 **TITLE III—SEVERABILITY**

11 If any particular provision of this Act, or the applica-
12 tion thereof to any person or circumstance, is held invalid,
13 the remainder of this Act and the application of such pro-
14 vision to other persons or circumstances shall not be af-
15 fected thereby.

○

Ms. NORTON. My apologies to the witnesses whom I have kept waiting and to my colleagues and staff. I was lead off witness myself at a hearing this morning on statehood for the District of Columbia in the District Building. I am afraid it started late and I was not able to get away. I apologize and we will move forthwith.

One of the witnesses we had scheduled has submitted his testimony for the record. So, that is one less witness and I think we will be all right. That is the corporation counsel from the District of Columbia from whom I have received written testimony which I would like, without objection, to submit into the record at this time.

[The prepared statement of Mr. Payton with footnotes follows:]

TESTIMONY

OF

JOHN PAYTON

CORPORATION COUNSEL

OF THE

DISTRICT OF COLUMBIA

BEFORE THE

SUBCOMMITTEE ON JUDICIARY AND EDUCATION

COMMITTEE ON THE DISTRICT OF COLUMBIA

ON

H.R. 1633

"DISTRICT OF COLUMBIA JUDICIAL
REORGANIZATION ACT OF 1993"

APRIL 28, 1993

MR. CHAIRMAN, MEMBERS OF THE SUBCOMMITTEE, MY NAME IS JOHN PAYTON, AND I AM CORPORATION COUNSEL OF THE DISTRICT OF COLUMBIA, THE CHIEF LEGAL OFFICER FOR THE DISTRICT. I AM PLEASED TO PRESENT THE VIEWS OF THE MAYOR OF THE DISTRICT OF COLUMBIA ON H.R. 1633, A BILL THAT WOULD REORGANIZE THE DISTRICT OF COLUMBIA'S COURT SYSTEM BY PROVIDING FOR AN INTERMEDIATE COURT OF APPEALS AND ESTABLISHING A NEW SUPREME COURT FOR THE DISTRICT OF COLUMBIA.

I AM PARTICULARLY PLEASED TO ADDRESS THE STRUCTURE OF THE APPELLATE COURTS IN THE DISTRICT BECAUSE I WAS INVOLVED WITH THAT SUBJECT EVEN PRIOR TO MY APPOINTMENT AS CORPORATION COUNSEL. I SAT AS ONE OF THE REPRESENTATIVES OF THE PRIVATE BAR ON THE DISTRICT OF COLUMBIA BAR'S SPECIAL COMMITTEE TO STUDY THE D.C. COURT OF APPEALS.

THE DISTRICT IS DEEPLY INTERESTED IN THE ADMINISTRATION OF JUSTICE IN ITS JURISDICTION. IT IS ESSENTIAL THAT OUR COURT SYSTEM HAVE ADEQUATE RESOURCES TO HANDLE THE INCREASING BURDENS BEING PLACED ON IT. IN ADDITION TO THIS OVERRIDING INTEREST, THE DISTRICT IS A LITIGANT IN ALL OF THE DIVISIONS¹ AND BRANCHES² OF THE SUPERIOR COURT AND IN A VARIETY OF LITIGATION IN THE COURT OF APPEALS (WHERE, IN ADDITION TO APPEARING IN APPEALS FROM SUPERIOR

¹CIVIL, CRIMINAL, FAMILY, TAX, AND PROBATE.

²JUVENILE, NEGLECT, LANDLORD-TENANT, MENTAL HEALTH.

APPEALS (WHERE, IN ADDITION TO APPEARING IN APPEALS FROM SUPERIOR COURT, IT DEFENDS THE DECISIONS OF LITERALLY SCORES OF GOVERNMENT AGENCY DECISIONMAKERS).

AS A FREQUENT LITIGANT, THE DISTRICT KNOWS BOTH THE ECONOMIC AND NON-ECONOMIC COSTS OF EXCESSIVE DELAY AND BACKLOGS IN THE COURT SYSTEM. THESE COSTS ARE NOT ONLY BORNE BY THE DISTRICT AS AN INSTITUTIONAL LITIGANT BUT ALSO BY ITS CITIZENS AND OTHERS WHO HAVE SOME CONTACT WITH THE JUDICIAL SYSTEM. FOR THESE REASONS, THE DISTRICT IS ACUTELY AWARE OF THE EXTENT TO WHICH THE COURTS AFFECT THE LIVES OF THOSE WHO LIVE, WORK AND DO BUSINESS IN THE DISTRICT, AND PROTECT THOSE WHO VISIT HERE.

THE MAYOR OF THE DISTRICT OF COLUMBIA SUPPORTS THIS BILL. THE BILL WOULD ESTABLISH A SUPREME COURT OF THE DISTRICT OF COLUMBIA AND AN INTERMEDIATE COURT OF APPEALS FOR THIS JURISDICTION. WE BELIEVE THAT SUCH STRUCTURAL REFORM IS CRITICAL TO ENSURE THE QUALITY OF JUSTICE IN OUR COURTS. RESTRUCTURING THE DISTRICT'S COURT SYSTEM IN THE WAY THE BILL DOES WILL SERVE TO RELIEVE THE BACKLOGS AND DELAYS IN THE PRESENT COURT SYSTEM.

THE APPELLATE BACKLOGS AND DELAYS ARE WELL KNOWN BY THE BENCH AND BAR. STUDY AFTER STUDY OF THE DISTRICT OF COLUMBIA APPELLATE COURT SYSTEM HAS REMARKED UPON THIS PROBLEM. EVERY COMMITTEE WHICH HAS STUDIED THE PROBLEM HAS RECOMMENDED

STRUCTURAL REFORM OF THE SYSTEM.³ FOR SEVEN OF THE LAST EIGHT YEARS, THE DISTRICT OF COLUMBIA COURT OF APPEALS HAS HAD A BACKLOG OF MORE THAN 2,000 CASES. THIS BACKLOG HAS CONTRIBUTED TO ONE OF THE WORST DELAYS IN GETTING CASES HEARD AND DECIDED AMONG APPELLATE COURTS IN THE NATION. THE AVERAGE TIME IT HAS TAKEN TO DISPOSE OF A CASE ON APPEAL --FROM THE TIME A NOTICE OF AN APPEAL IS FILED UNTIL A CASE IS DECIDED--HAS BEEN ALMOST TWO FULL YEARS. THESE BACKLOGS DID NOT JUST START TO OCCUR. THEY HAVE BEEN HALLMARKS OF THE PRESENT COURT OF APPEALS FOR THE LAST TEN YEARS. NO COURT WANTS A REPUTATION FOR BEING THE SLOWEST COURT TO HEAR AND DECIDE A CASE. NO LITIGANT IS COMFORTED TO KNOW THAT IT TAKES NEARLY TWO FULL YEARS FOR OUR COURT OF APPEALS TO DISPOSE OF A CASE.

³WITHIN THE LAST TWELVE YEARS, THE APPELLATE SYSTEM OF THE DISTRICT OF COLUMBIA COURTS HAS BEEN STUDIED BY A NUMBER OF COMMITTEES. THE LATEST, AND PERHAPS MOST COMPREHENSIVE, STUDY WAS COMPLETED BY THE SCHALLER COMMITTEE IN 1989. OTHER STUDIES INCLUDE THE BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA (1988), THE NATIONAL CENTER FOR STATE COURTS (1986), AND THE DOUGLAS COMMITTEE (1979). EACH OF THESE COMMITTEES RECOMMENDED THE ESTABLISHMENT OF AN APPELLATE SYSTEM IN WHICH THERE IS A LAW-DECLARING COURT OF LAST RESORT WHICH SITS EN BANC, AND AN ERROR-CORRECTING INTERMEDIATE COURT WITH THREE JUDGE PANELS. ALTHOUGH THE HORSKY COMMITTEE RECOGNIZED THAT THE SYSTEMIC PROBLEMS IN THE APPELLATE SYSTEM COULD BE SOLVED THROUGH A LAYERED SYSTEM OF APPELLATE REVIEW, IT FOUND SUCH A PLAN NOT BE "POLITICALLY FEASIBLE". THE HORSKY COMMITTEE THEN FOCUSED ITS ATTENTION ON OTHER WAYS TO REDUCE THE BACKLOG AND DELAY IN THE APPELLATE SYSTEM. ONE OF ITS RECOMMENDATIONS WAS TO ADD THREE JUDGES TO THE COURT OF APPEALS. AS IT TURNS OUT, THE HORSKY COMMITTEE'S PROPOSALS WERE BASED ON THE FAULTY ASSUMPTION THAT FILINGS IN THE COURT OF APPEALS WOULD PLATEAU AT APPROXIMATELY 1200 ANNUALLY. REGRETTABLY, FILINGS HAVE INCREASED SINCE THE HORSKY COMMITTEE LAST STUDIED THE ISSUE, THE BACKLOG PROBLEM HAS ENDURED, DELAYS ARE LONGER THAN THEY HAVE EVER BEEN, AND UNLESS SECTIONS OF THIS BILL ARE ENACTED, THERE IS NO RELIEF ON THE IMMEDIATE HORIZON.

I SHOULD PAUSE HERE TO EMPHASIZE THAT THIS SITUATION HAS OCCURRED DESPITE EXTRAORDINARY EFFORTS BY THE JUDGES ON THE COURT OF APPEALS. THEY HAVE LITTLE OR NOTHING TO DO WITH INCREASED FILINGS OF CASES IN THEIR COURT, AND THEY ARE VIRTUALLY POWERLESS TO STEM THE TIDE. IN FACT, THE APPELLATE JUDGES HAVE STEPPED UP THEIR EFFORTS TO MEET THIS CHALLENGE. THEIR PRODUCTIVITY CAN BE EASILY DEMONSTRATED BY AN EXAMINATION OF THEIR WORK PRODUCT OVER THE LAST TWO DECADES.

AS MEASURED IN DISPOSITIONS BY WAY OF WRITTEN OPINION, THE COURT OF APPEALS ANNUALLY ISSUED BETWEEN 600 AND 700 OPINIONS DURING THE DECADE OF THE 1970'S. FOR MUCH OF THE 1980'S, THE COURT INCREASED THE NUMBER OF PUBLISHED AND UNPUBLISHED OPINIONS IT ISSUED TO APPROXIMATELY 800 PER YEAR. THE LAST TWO YEARS FOR WHICH STATISTICS ARE NOW AVAILABLE--1991 AND 1992--THE COURT ISSUED OVER 850 PUBLISHED AND UNPUBLISHED OPINIONS PER YEAR. A STUDY CONDUCTED A FEW YEARS AGO BY THE NATIONAL CENTER FOR STATE COURTS REPORTED THAT THE D.C. COURT OF APPEALS WAS MORE PRODUCTIVE THAN ANY OTHER SIMILARLY SITUATED HIGHEST COURT.⁴

THIS HIGH LEVEL OF PRODUCTIVITY HAS NOT COME WITHOUT COST. THE INCREASE IN THE NUMBER OF UNPUBLISHED OPINIONS HAS RISEN STEADILY FOR THE LAST SEVERAL YEARS.⁵ THESE DECISIONS HAVE NO

⁴SCHALLER REPORT AT 22, N. 21.

⁵ THE COURT OF APPEALS HAS FOUND IT IMPOSSIBLE, MORE OFTEN THAN NOT, TO KEEP CURRENT, AND HAS ONLY MANAGED TO KEEP ITS BACKLOG FROM BECOMING STILL WORSE BY ISSUING A GREATER PROPORTION

PRECEDENTIAL VALUE, AND THEY DO NOT SERVE AS USEFUL GUIDEPOSTS TO LITIGANTS IN FUTURE CASES. IT IS NOT A SLIGHT TO THE FINE JUDGES ON THE COURT OF APPEALS TO RECOGNIZE THAT TIME PRESSURES AND THE LAUDABLE GOAL OF WANTING TO REDUCE THE BACKLOG CONTRIBUTE TO LESS CAREFULLY CONSIDERED DECISIONS IN SOME CASES. THIS IS A PRICE NO LITIGANT SHOULD HAVE TO PAY WHEN A CLEAR, UNIVERSALLY RECOGNIZED ALTERNATIVE CAN BE FASHIONED TO RID THE COURT OF ITS BACKLOG AND PREVENT DELAY.

THIS UNREMITTING PRESSURE TO PRODUCE HAS INEVITABLY AFFECTED THE QUALITY OF JUSTICE IN OTHER WAYS AS WELL. THE COURT OF APPEALS, OF NECESSITY, OPERATES ALMOST ENTIRELY IN PANELS OF THREE JUDGES.⁶ DURING THE 1980'S, WHEN ORDINARILY ISSUING 800 OPINIONS A YEAR, THE COURT SAT EN BANC NO MORE THAN A DOZEN TIMES PER YEAR; AND IN SEVERAL YEARS DURING THAT DECADE IT HAD ONLY FIVE OR SIX EN BANC SITTINGS. THE IMPACT OF THIS PRACTICE SHOULD NOT BE UNDERSTATED, FOR AS THE SCHALLER COMMITTEE NOTED, "IN A

OF UNPUBLISHED DECISIONS. BETWEEN 1980 AND 1990, THE COURT OF APPEALS DISPOSED OF AS MANY CASES AS WERE FILED ONLY FOUR TIMES. DURING THE SAME PERIOD, THE COURT WAS INCREASINGLY RELYING ON UNPUBLISHED DECISIONS. WHILE THE COURT HAD RARELY ISSUED AS MANY AS 400 UNPUBLISHED DECISIONS A YEAR PRIOR TO 1980, SINCE 1982, IT HAS ORDINARILY ISSUED 500 UNPUBLISHED DECISIONS A YEAR. AND, IN THE LAST TWO YEARS FOR WHICH WE HAVE DATA, 1991 AND 1992, THE COURT ISSUED OVER 500 UNPUBLISHED OPINIONS IN EACH OF THOSE YEARS. IN 1991, THE COURT DISPOSED OF MORE CASES THAN IT RECEIVED, BUT IN 1992, IT DISPOSED OF FEWER CASES THAN IT RECEIVED.

⁶ SIGNIFICANTLY, THE SCHALLER COMMITTEE OBSERVED, BASED ON ITS RESEARCH OF THE COURT'S WORKLOAD, THAT MANY OF THE PUBLISHED DECISIONS WERE THE PRODUCT OF A SINGLE JUDGE, RATHER THAN A COLLABORATIVE EFFORT. THE AMOUNT OF TIME THAT ANY JUDGE CAN SPEND ON OPINIONS ASSIGNED TO ANOTHER JUDGE IS QUITE LIMITED.

COURT OF LAST RESORT . . . IT IS PARTICULARLY IMPORTANT THAT THE LAW BE DECLARED BY A COLLEGIAL BODY, BOTH BECAUSE DECISIONS WILL BE THE PRODUCT OF GREATER WISDOM, AND BECAUSE OF THE RESTRAINT ENGENDERED WHEN DECISIONS ARE FORGED FROM A CONSENSUS OF DIFFERENT VIEWPOINTS."⁷

THE UNIQUE CHARACTER OF APPELLATE DELIBERATION IS RESTORED IN THIS LEGISLATION. THE BILL TRANSFORMS THE EXISTING COURT OF APPEALS INTO A NEW (EVENTUALLY SEVEN JUDGE) SUPREME COURT, WHICH WILL ASSUME THE LAW-DECLARING, PRECEDENT-SETTING FUNCTION OF A COURT OF LAST RESORT, AND PERMITS THE ESTABLISHMENT OF AN INTER-MEDIATE COURT WHOSE SOLE FUNCTION WILL BE ENSURING FAIRNESS IN PARTICULAR CASES, THAT IS, CORRECTING ERRORS MADE AT THE TRIAL LEVEL. THE NEW SUPREME COURT WILL ALWAYS SIT EN BANC; THE INTERMEDIATE COURT, ONLY IN PANELS. REDUNDANT APPEALS CAN BE AVOIDED, BECAUSE THE NEW SUPREME COURT MAY DECIDE CASES NEVER RULED UPON BY THE INTERMEDIATE COURT AT ITS OWN INITIATIVE, OR AT THE BEHEST OF THE INTERMEDIATE COURT OR OF ANY PARTY.⁸ THE BILL'S PROPOSED APPELLATE STRUCTURE COMPORTS WITH THE AMERICAN BAR ASSOCIATION'S STANDARDS RELATING TO COURT ORGANIZATION (§ 1.13) AND STANDARDS RELATING TO APPELLATE COURTS (§ 3.01). FURTHERMORE, IT FOLLOWS THE MODEL ADOPTED BY ALL BUT 13 STATES, AND NONE OF THESE 13 JURISDICTIONS HAS EVEN HALF THE NUMBER OF

⁷ SEE SCHALLER COMMITTEE REPORT AT 27.

⁸SEE SECTION 11-621 OF H.R. 1633.

CASES FILED ANNUALLY IN THE D.C. COURT OF APPEALS.

SUBSTANTIVE OBJECTIONS TO ESTABLISHING A SUPREME COURT AND AN INTERMEDIATE COURT OF APPEALS, AS WE UNDERSTAND THEM, ARE TWO-FOLD: THAT THE PRESENT PROBLEMS OF APPELLATE DELAY AND BACKLOG CAN BE RESOLVED WITHOUT CREATING A NEW COURT, AND THAT ANOTHER COURT WILL INEVITABLE PRODUCE ADDITIONAL DELAYS BECAUSE IT IS "SIMPLY ANOTHER LAYER" OF REVIEW. LET ME BRIEFLY ADDRESS THESE CONCERNS.

THE SUGGESTION THAT THE PRESENT BACKLOG AND DELAY PROBLEMS INHERENT IN THE APPELLATE PROCESS IN THE DISTRICT OF COLUMBIA COURT SYSTEM CAN BE CORRECTED BY ALTERNATIVE MEANS IS NOT WELL-FOUNDED. INDEED, THE USUAL ALTERNATIVES OFFERED --ADDING MORE JUDGES OR ADVOCATING THE EFFICACY OF TECHNOLOGICAL IMPROVEMENTS-- ARE SOLUTIONS WHICH ARE ILLUSORY, UNPROVEN, OR UNDESIRABLE. FOR EXAMPLE, THE HORSKY COMMITTEE RECOMMENDED ADDING JUDGES TO THE COURT OF APPEALS AS A WAY OF SOLVING THE BACKLOG. THE PREMISE FOR THAT RECOMMENDATION, AS I HAVE STATED PREVIOUSLY, IS THAT APPELLATE FILINGS WOULD PEAK AT APPROXIMATELY 1,200 ANNUALLY, AND THAT ADDITIONAL JUDGES COULD HELP THE COURT TAKE CONTROL OF ITS DOCKET. THE PREMISE SIMPLY PROVED FALSE. BACKLOGS PERSIST AS FILINGS INCREASE.⁹

⁹ MR. HORSKY TESTIFIED BEFORE THIS COMMITTEE IN 1988 THAT ADDING A FEW JUDGES TO THE PRESENT COURT OF APPEALS WAS NOT A SOLUTION TO THE APPELLATE PROBLEMS IN THIS JURISDICTION. HE THUS JOINED EVERY GROUP THAT HAS STUDIED THE PROBLEM BEFORE OR SINCE IN CONCLUDING THAT THE KIND OF SERIOUS STRUCTURAL REFORM PROPOSED IN

IN FACT, CONGRESS MANDATED THE CREATION OF EIGHT ADDITIONAL JUDGES ON THE SUPERIOR COURT (THE TRIAL COURT LEVEL) IN 1990. THE RISE OF CRIMINAL CASES CAUSED BY INCREASED DRUG ACTIVITY AND ITS ATTENDANT VIOLENCE PROMPTED THIS CONGRESSIONAL RESPONSE. MORE JUDGES AT THE TRIAL LEVEL INEVITABLY MEAN MORE APPEALS LODGED. THE FRONT LOADING OF THE SYSTEM MAKES THE NEED FOR RELIEF AT THE BACK END NOW MORE CRITICAL THAN EVER.

NOR IS TECHNOLOGY THE ANSWER TO THIS BILL. WHILE I AM A FAN OF COMPUTERIZATION AND THE EFFICIENCY IT PRODUCES, CASES STILL HAVE TO BRIEFED, ARGUED, RESEARCHED BEFORE DECISION, AND AN OPINION MUST BE RENDERED. AUDIO TRANSCRIPTION, EDITED RECORDS ON APPEAL OR OTHER USEFUL EXPEDIENTS WILL HAVE LITTLE IMPACT ON THE BACKLOG, AND BECAUSE OF THE INCREASED TRIAL ACTIVITY, THESE DEVICES MAY HAVE A NEGLIGIBLE EFFECT ON DELAY.

THE SECOND CONCERN RAISED ABOUT THE SOLUTION OFFERED BY H.R. 1633 IS THAT A SUPREME COURT WILL SIMPLY ADD ANOTHER LAYER OF REVIEW WHICH WILL ADD TO THE BACKLOG AND DELAY PROBLEMS, NOT SOLVE THEM. QUITE SIMPLY, DISCRETIONARY DIRECT REVIEW BY THE SUPREME COURT WILL NOT CAUSE DELAY AND WILL AVOID REDUNDANT REVIEW. THE EXPERIENCE OF MOST COURTS OF LAST RESORT IS THAT THEY WILL ONLY HEAR CASES OF MAJOR IMPACT, NOT EVERY CASE WHICH MAY HAVE BEEN ERRONEOUSLY DECIDED BY THE COURT BELOW.

H.R. 1633 IS NECESSARY.

WE AGREE WITH THE NEARLY UNANIMOUS VIEW THAT BASIC STRUCTURAL REFORM, SEPARATING THE LAW-DECLARING AND ERROR-CORRECTING FUNCTIONS, IS NECESSARY TO ELIMINATE THE BACKLOG, TO PROVIDE PROMPT APPELLATE DECISIONS EVEN IN COMPLEX AND DIFFICULT CASES, AND TO ENSURE QUALITY DECISIONMAKING.

WE DO NOT BELIEVE THAT THE PROPOSED, TWO-COURT APPELLATE SYSTEM WILL RESULT IN DELAY. THE ABILITY OF THE NEW SUPREME COURT TO REVIEW DIRECTLY CASES FROM THE SUPERIOR COURT SHOULD SIGNIFICANTLY AVOID DUPLICATIVE REVIEW, AS IT HAS IN MASSACHUSETTS, FOR EXAMPLE.¹⁰ INDEED, EVEN WITHOUT SUCH A PROCEDURE, THE ESTABLISHMENT OF ERROR-CORRECTING INTERMEDIATE COURTS HAS SIGNIFICANTLY SPEEDED UP THE APPELLATE PROCESS (LARGELY WITHOUT DUPLICATIVE REVIEW) IN OTHER JURISDICTIONS, SUCH AS MARYLAND AND MINNESOTA.¹¹

IN SUM, WE ENDORSE H.R. 1633. THE BILL ACKNOWLEDGES THAT A JUDICIAL SYSTEM MUST BE RESPONSIVE TO THE DEMANDS PLACED ON IT BY LITIGANTS. FOR THE DISTRICT OF COLUMBIA COURT SYSTEM TO CONTINUE TO ENJOY THE FINE REPUTATION IT HAS FOR THE QUALITY OF ITS JURISPRUDENCE, H.R. 1633 MUST BE ENACTED. EXCESSIVE DELAY AND HUGE BACKLOGS UNDERMINE JUSTICE.

MR. CHAIRMAN, MEMBERS OF THE SUBCOMMITTEE, ON BEHALF OF

¹⁰SEE SCHALLER REPORT AT 28.

¹¹ID. AT 31-32.

MAYOR SHARON PRATT KELLY, I WOULD LIKE TO THANK THE SUBCOMMITTEE
FOR ALLOWING ME TO EXPRESS THESE VIEWS ON THIS MATTER.

Ms. NORTON. This subcommittee will take up H.R. 1633, a bill to create a supreme court for the District of Columbia today. Five years ago, this committee began the process of confronting what many consider to be the most serious problem confronting the District of Columbia, violence and criminal acts. Every area of the country has been profoundly affected by rising crime rates, especially large cities.

Backlog—Appeals

When we started this process in 1988, the appeals court had a 12- to 15-month backlog. Today, that has nearly doubled to between 22 to 24 months. Such delays surely cannot be tolerated in the face of the mounting crime in our city and increasing court congestion with cases of every kind.

In an effort to confront these serious problems, the District Committee, on a bipartisan basis in 1989, passed the first in a series of legislative packages that began to bring a level of relief to the residents of this city. The committee reported out and the House passed H.R. 1502 which authorized the appropriation of funds to the District of Columbia for 700 additional police officers and for the development of a community-oriented police department. In addition to H.R. 1502, the committee moved expeditiously to increase the D.C. Superior Court by eight additional judges and appropriate support staff.

Legislative History

H.R. 1633, the bill before us today, had its beginnings in 1986 when Chief Judge William Pryor engaged judiciary and subcommittee chairman, Mervyn Dymally in considerable discussion about the creation of a supreme court for the District of Columbia Superior Court system.

On April 13, 1988, Congressmen Fauntroy, Dymally and Mazzoli introduced H.R. 4366, a bill to establish a supreme court of the District of Columbia. On April 19 and 28, 1988, the D.C. Subcommittee on Judiciary and Education held hearings on H.R. 4366. Witnesses included Hon. William C. Pryor, then chief judge of the D.C. Superior Court; Larry P. Polansky, executive officer, D.C. courts; and Richard Hoffman, clerk of the court of appeals.

In addition, the subcommittee heard testimony from Frederick D. Cooke, Jr., then corporation counsel of the District of Columbia; Hon. Wilhelmina Rolark, D.C. city council member; as well as other distinguished members of the bar. The bill had especially broad support among members of the bar including the official and strong endorsement of the Bar Association of the District of Columbia.

Again, during the 101st Congress, this subcommittee held extensive hearings on the creation of a supreme court. Between October 26, 1989, and March 15, 1990, this subcommittee held 5 days of hearings and markup on H.R. 4257, a bill similar to H.R. 1633. An entire day of hearings was devoted to witnesses in opposition.

The subcommittee also heard from the D.C. corporation counsel, the Chair of the D.C. Council, the Chair of the D.C. Council's Judiciary and Education Subcommittee, Hon. Fred Ugast and Hon.

Judith Rogers, the Chair of the D.C. Bar's Special Committee to study the District of Columbia Court of Appeals and Hon. Charles McC. Mathias, Jr., president of the Council for Court Excellence.

Witnesses in opposition included Hon. John W. Kern III, senior judge of the D.C. Court of Appeals; Alan I. Herman, Esq., former clerk of the D.C. Court of Appeals; and Hon. Frank Q. Nebeker, chief judge of the U.S. Appeals and former associate judge of the D.C. Court of Appeals. These witnesses opposed the legislation and recommended that additional judges be added to the court of appeals in order to address the court's backlog problem.

Mayor Sharon Pratt Kelly included the supreme court in her anticrime package last year because she thought it so important to address as a part of what was needed to address crime in the District of Columbia.

Earl Silbert, Esq., former U.S. attorney for the District of Columbia, submitted a written statement for the record at the November 15 hearing, in opposition of the bill. The U.S. Department of Justice provided a written statement in opposition to the bill, although no representative presented testimony.

Based on a substantial hearing record extending over two sessions of Congress, the D.C. Subcommittee on Judiciary and Education referred H.R. 4257 to the full committee for consideration on March 15, 1990. On October 2, 1990, H.R. 4257 was amended by the full committee and passed by a vote of 11 to 1. It was sent to the House where it passed unanimously and was forwarded to the Senate but could not be taken up before the closing hours of the 101st Congress.

Early in 1991 at the beginning of the 102d Congress, I joined with my colleague and former D.C. Judiciary and Education Subcommittee Chair, Mervyn Dymally, in sponsoring H.R. 568, the D.C. Supreme Court bill. Once again, hearings were held, witnesses called representing opinions on both sides of the issue and markup held. The bill was amended and sent on to the full committee where once again it was reported favorably to be sent to the House for consideration.

Today, at the start of the 103d Congress, 5 years after it was first considered by this subcommittee and 7 years after Judge Pryor began his quest, we are still considering a bill to create a supreme court for the District of Columbia. The problem grows worse and the backlog grows worse.

If I may interject, as a member of the Joint Committee on the Reorganization of Congress, this process illustrates why the Congress is so inefficient and why so little gets done. Repetitive testimony in spite of clear evidence that the great majority of this committee and the great majority of the House supports this bill. The case has been definitively made.

I cannot imagine, frankly, that we can learn much more about the need for a supreme court than what we have learned during the past 7 years, while allowing both of these courts to suffer under backlogs that could have been prevented with more expeditious action by the Congress of the United States.

This notwithstanding, let me again outline for the record what H.R. 1633 will establish. H.R. 1633 is very similar to H.R. 568 introduced in the 102d Congress and is also similar in nature to H.R.

4257, the bill passed in the 101st Congress and H.R. 4366, the first bill introduced in the 100th Congress.

As introduced, H.R. 1633 establishes a seven-member supreme court by elevating the present nine-member appellate court and, by attrition, allowing the size to diminish to seven.

It would put the District of Columbia on a par with most States in the Union which have a three-tier court system. You have to be living back somewhere in the 19th century to still have a two-tier court system or not to care very much about the administration of justice in a jurisdiction of this size.

The President would then appoint nine new judges to fill the court of appeals.

It provides for four additional superior court judges, two to be appointed by the President in October 1993; two to be appointed by the President in October 1994.

It changes the makeup and size of the Joint Committee on Judicial Administration. Presently, the committee has five members, two from the appellate and three from the superior court. Under H.R. 1633, there would be a seven-member joint committee made up of the chief judge of the supreme court, two associate justices; the chief judge of the appellate court; and the chief judge of the superior court and two associate judges. In addition, it provides that by fiscal year 1996, this committee will consider the efficacy of the makeup of the Joint Committee on Judicial Administration.

The new bill authorizes \$15.5 million over a 6-year period beginning fiscal year 1994, ending September 30, 1999.

I now yield to the ranking member. He is not here at this time, so I will quickly call the first two witnesses and ask if Judge Rogers and Judge Ugast would please step to the witness table.

You may proceed.

STATEMENTS OF HON. JUDITH W. ROGERS, CHIEF JUDGE, D.C. COURT OF APPEALS; AND HON. FRED B. UGAST, CHIEF JUDGE, D.C. SUPERIOR COURT

STATEMENT OF HON. JUDITH W. ROGERS

Judge ROGERS. Good morning, Madam Chairperson.

I have a written statement that I would request be made a part of the record, and included in that statement is a statement of mine made in May 1991, which I am requesting be made part of the record.

I want to thank you, Madam Chairperson and this committee, for addressing this bill early in the 103d Congress. For the reasons you have outlined, I would agree that I think the record is clear.

My statement points out that there have been four independent studies during the past 12 years which have concluded that establishment of an intermediate court, as proposed in your legislation, would be an asset in processing a heavy docket of criminal and civil appeals. I would point out that legislation has a reach-down and pull-back provision so that it would not exacerbate delays on appeal.

Last year, the District of Columbia Court of Appeals celebrated the 50th anniversary of the establishment by Congress in 1942 of

the D.C. Municipal Court of Appeals. That court served for 29 years as the intermediate appellate court in the District of Columbia at a time when the filings on appeal were far less than they are now. Except for the last 22 years, there has always been an intermediate appellate court structure in the District of Columbia.

In 1970, Congress established the current State-type court system we have in the District of Columbia, providing that, as of 1971, all appellate review would go to a single appellate court.

Since 1971, however, the workload of the trial and appellate courts in the District has greatly increased. Between 1970 and 1990, the number of appeals more than tripled. The volume of appeals continued to rise after the first study by the D.C. Bar in 1979 recommended the establishment of an intermediate appellate court when delay on appeal was only 15½ months.

Between 1976 and 1986, the National Center for State Courts found that the number of appeals had increased by 34 percent.

An appellate court, acting collegially, has two functions: To review trial court and administrative agency decisions for error and to decide important questions of District of Columbia law. Two valuable social goals are also at stake: To revolve cases quickly and to provide stability in the law through its long-term development.

As the legislatures for the State and Federal governments have recognized, a single appellate court with a heavy case load cannot perform both functions and at the same time hope to meet both goals effectively.

Backlog—Appeals

The numbers demonstrate the severity of the problem. During March 1993, there were 2,186 appeals pending in the D.C. Court of Appeals. In 1992, more than 70 percent of the criminal convictions were appealed. Appeals in civil cases have increased 43 percent in the past 4 years. In 1992, the total number of new appeals increased by 5 percent, from 1,567 in 1991 to 1,643 in 1992. The backlog of 2,000 appeals has continued to burden the court of appeals despite sophisticated case management.

In addition, motions, now numbering over 4,700 have become more complex, with many substantive motions—over 1,400—being the equivalent of full appeals.

I would add there is no such thing as dismissal for want of prosecution in the court of appeals. Rather, all motions have to be addressed by three judges on the court, except for procedural motions which the chief judge is authorized to resolve.

In 1992, the court also addressed over 100 petitions for review of cases decided by three-judge divisions. This case load is greater than the combined case load in nine States that have both an intermediate appellate court and a State supreme court. It is also a case load that the National Center for State Courts found in 1986 to be higher by far than that of the highest court in the 13 States which did not have an intermediate appellate court. Since then, Nebraska with 1,270 annual filings, compared to the 1,650 in the D.C. Court of Appeals, has established an intermediate appellate court.

Case Management

Institution of a Case Management Program in 1990 improved case disposition, but it also clearly demonstrated the limits of case management in resolving fundamental problems of congestion and delay on appeal. Three quarters of the increases in dispositions after the first year of the Case Management Program was the result of orders disposing of old and unperfected appeals. The process of weeding out old appeals through case management continued in the second and third year.

However, by 1992, the third year, the dispositions no longer exceeded the number of new filings. Indeed, there have only been 4 years of the court's history where the number of dispositions have exceeded filings, and 3 of the years involve the efforts by the court to weed out old and unperfected appeals.

Despite the creation of a second summary calendar, a second motions calendar, and the expanded use of senior judges, despite improved record and transcript transmission, despite revision in rules and policies designed to encourage motions practice and discourage continuances on appeal, congestion and delay persist.

Furthermore, despite increased productivity through these and other case management actions, the average time for a case to be disposed of on appeal remains at 22 months, almost 2½ times the ABA standards.

In that connection, Madam Chairperson, I would note that we measure our backlog by the number of appeals that have been filed. Those cases are waiting to be decided by the court.

We have had an experimental program with an advanced calendaring system where bias of the date an appeal is noted. We have set the times for briefing. We have set the time for oral argument. However, we found that, by having that advanced calendaring system, we were backing up a vast number of appeals where cases were ready to be heard and there were no three-judge divisions available to hear those appeals. Furthermore, by the time those appeals were being heard, the briefs were stale, so the parties were asking to supplement those briefs or file what we call Rule 28-K letters indicating new authority which the court should address.

So we decided, as a board of judges, that there is no point in asking the litigants in this jurisdiction to hurry up and wait because, by the time the court would be able to reach their appeals, new decisions, new authority would have to be addressed.

In other words, the Case Management Program has enabled the court to assure that its case load is current by weeding out old and unperfected appeals and by moving simple appeals through the court more quickly. But case management does not eliminate the case load or the complex and important questions of law that need to be decided.

The varied responsibilities of the D.C. Court of Appeals shows no sign of waning. The number of appeals has continually increased in the last two decades. Indeed, I would point out that in the recent statistical analysis by the National Center for State Courts it points out that the growth in the 1991 case load extends an ongoing cycle. They point out that, since 1984, civil case loads have

risen by 33 percent, criminal case loads by 24 percent, juvenile case loads by 34 percent.

The National Center says, quote, Based on past trends, it seems likely that many trial and appellate courts will see case loads double before the end of the decade. End of quote.

Case Load

In view of the case load and expansion of the size of the trial court, the number of appeals in the District of Columbia is unlikely to diminish. The Criminal and Family Division calendars in the trial court have been expanded. Alternative dispute resolution and civil delay reduction in the trial court have not reduced the appellate case load. Shifting more cases to the small claims branch in the trial court still means that the appellate court will have to consider petitions for review as well as civil appeals.

The D.C. Court of Appeals as the District's highest court also continues to have substantial non-case-related responsibilities, including admission and discipline of members of the bar, promulgation and review of rules, and oversight responsibilities for the D.C. Bar and the unauthorized practice of law.

Furthermore, the ability of the en banc court to perform its jurisprudential function remains severely hampered, although the District's highest court is presented with the same types of legal issues as are the highest courts of the State other than questions of State constitutional law.

En Banc Decisions

The District's highest court, at most, has been able to sit as a full court on only 10 to 12 cases a year. With a backlog in excess of 2,000 cases, the court sitting in three-judge divisions is under pressure to dispose of as many cases as it can in as short a period of time as it can. In the past 12 months, due to those pressures, the court sat as a full court on only five occasions.

There is a reluctance among judges to force the full court to focus on a single appeal at the risk of further delay in deciding other cases. Consequently, the jurisprudential function of the District's highest court is relegated to majority votes by burdened three-judge divisions with the unavoidable result that conflicts remain unresolved and important questions of law remain uncertain, unclear and undecided.

The development of the law takes substantial time, and the District's single appellate court cannot handle both a high volume of appeals and three-judge divisions and devote the time that is required by the full court to address important questions of District of Columbia law.

These are precisely the circumstances that the American Bar Association has identified as necessitating the creation of an intermediate appellate court.

According to its standards: "The appellate court should fulfill the judicial functions of reviewing trial court proceedings and formulating and developing the law. Where the volume of appeals is such that the State's highest court cannot satisfactorily perform these

functions, a system of intermediary appellate courts should be organized."

Intermediate Court

Thirty-nine States facing the same situation as the District of Columbia have acted to establish intermediate appellate courts, enabling more cases to be decided more quickly without impeding the development of the law. The four independent studies addressing the situation in the District of Columbia have concluded that the same solution is required here.

The most recent statistics compiled by the National Center for State Courts, the State Justice Institute and the Conference of State Court Administrators indicate that the mandatory case load of the D.C. Court of Appeals—as contrasted to case load over which the appellate court has discretion whether to accept an appeal—is 66 percent higher than the next largest volume court in a State without an intermediate appellate court.

Under the D.C. Self-Government Act, as you pointed out, Congress has retained legislative responsibility for the organization of the District of Columbia courts. This decision was made after Congress had established a State court system for the District in the Court Reform Act of 1970. In all States with a comparable appellate workload, the State legislatures have established intermediate appellate courts, and, as the four independent studies here document, Congress should do so on behalf of the District.

When I last appeared before the committee during the 102d Congress, the ranking Republican member asked that I provide further justification, in addition to that in the four independent studies and the testimony presented at the hearings, for the need to establish an intermediate appellate court. I have provided information, demonstrating again the need to assure that more cases on appeal are decided more quickly and to facilitate the law-stating function of the District's highest court. In addition, I have responded to questions when I have appeared before the committee.

Moreover, in my statement of May 9, 1991, I outlined the background of the current court system, summarized the four independent studies, and suggested amendments to the bill.

In view of the existing studies, the comparability of the jurisdiction of the District of Columbia court system and the State court systems, the similarity between the District's statutes and regulations to those of the States, combined with the substantial expansion of the trial court in recent years, further study would simply confirm what is already known.

Furthermore, with the support of the Board of Judges, the D.C. Court of Appeals has implemented various suggestions offered for resolving problems of congestion and delay on appeal. But, as experience in the State court systems previously demonstrated, these piecemeal solutions are not equal to the task. Consequently, while suggestions for improved records management, use of additional judges, revisions in rules and policies have proved useful, they have not enabled the District of Columbia to have an appellate court system that is able to perform both its error review and its jurisprudential functions in a timely and appropriate manner.

Justice on appeal requires that appeals be resolved in a timely and just manner where mechanisms exist to resolve uncertainties and conflicts as well as to address developments in the law. Without an institutional structure that can fulfill its responsibilities to perform these functions, public confidence in our system of justice is not enhanced.

In the classic study of justice on appeal, Professors Carrington, Meador and Rosenberg observed: "On the one hand, appellate justice is preoccupied with the impact of decisions on particular litigants, but on the other it is concerned about the general principles which govern the affairs of persons other than those who are party to the case decided. While appellate justice has impact on the realities of situations, it also affects the appearances and symbols which pervade the government. An appellate system which is unduly preoccupied with one of these functions to the neglect of the other is inadequate to advance the purposes which appellate courts should serve."

Recent events have underscored the importance of public confidence in the judicial system to maintaining the fabric of our society. Those who reside in, do business in, and visit the Nation's Capital must be assured that the appellate court, as well as the trial court, can provide for the peaceful, timely and just resolution of societal and individual disputes.

Paralleling this point, you have pointed out during last year's markup: "The D.C. courts are clogged at both the top and the bottom. This bill brings relief at both ends."

I respectfully urge the committee to take prompt, favorable action on legislation to establish the intermediate court in the District of Columbia.

Thank you, Madam Chairperson.

Ms. NORTON. Thank you very much, Judge Rogers.

[The prepared statement of Judge Rogers with footnotes and attachments follows:]

STATEMENT OF THE HONORABLE JUDITH W. ROGERS
CHIEF JUDGE OF THE DISTRICT OF COLUMBIA COURT OF APPEALS
to the

Subcommittee on the Judiciary and Education
House Committee on the District of Columbia
ON

H.R. 1633, To create a Supreme Court of the District of Columbia
and for other purposes

April 28, 1993

Madam chairperson: I am pleased to appear before the House District Committee Subcommittee on the Judiciary and Education regarding H.R. 1633, To create a Supreme Court of the District of Columbia, and for other purposes. I appreciate the Committee's prompt attention to this legislation early in the 103rd Congress. My remarks will focus on the proposal to establish an intermediate appellate court, which four independent studies in the past 12 years have concluded would be an asset in processing a heavy docket of criminal and civil appeals. Mayor Sharon Pratt Kelly has requested enactment of this legislation as an important part of the Mayor's Crime Control package.¹

Last year the D.C. Court of Appeals celebrated the 50th Anniversary of the establishment by Congress in 1942 of the D.C. Municipal Court of Appeals. That Court served for 29 years as

¹ See letters of November 27, 1991, from Mayor Kelly to: Honorable Ronald V. Dellums, chairman, House Committee on the District of Columbia; Honorable John Glenn, chairman, Senate Committee on Governmental Affairs; Honorable John A. Wilson, chairman, Council of the District of Columbia, at 2.

the District's intermediate appellate court. Except for the last 22 years, there has always been an intermediate appellate court structure in the District of Columbia.

In 1970, Congress established a state-type court system for the District of Columbia, and provided that as of 1971 all appellate review would be conducted by a single appeals court. Since 1971, however, the workload of the trial and appellate courts in the District of Columbia has greatly increased. Between 1970 and 1990, the number of appeals more than tripled. The volume of appeals continued to rise after the first study by the D.C. Bar in 1979 recommended establishment of an intermediate appellate court. Between 1976 and 1986, the number of appeals increased by 34 percent. See Chart 1, attached.

An appellate court, acting collegially, has two basic functions: to review trial court and administrative agency decisions for error, and to decide important questions of District of Columbia law. Two valuable social goals are also at stake: to resolve cases quickly and to provide stability in the law through its long-term development. As the legislatures for the state and federal governments have recognized, a single appellate court with a heavy caseload cannot perform both functions and at the sametime hope to meet both goals effectively.

The numbers demonstrate the severity of the problem. During March of 1993, there were 2,186 appeals pending in the D.C. Court of Appeals. In 1992, more than 70 percent of the criminal convictions were appealed. Appeals in civil cases have increased 43 percent in the past four years. In 1992, the total number of new appeals increased by five percent: from 1,567 in 1991 to 1,643 in 1992. The backlog of 2,000 appeals has continued to burden the D.C. Court of Appeals despite sophisticated case management. In addition, motions, now numbering over 4,700, have become more complex, with many substantive motions (over 1,400) being the equivalent of full appeals. In 1992, the Court also addressed over 100 petitions for review of cases decided by three-judge divisions.

This caseload is greater than the combined caseload in nine states that have both an intermediate appellate court and a state supreme court. It is also a caseload that the National Center for State Courts found in 1986 to be "higher by far" than that of the highest court in the thirteen states which did not have an intermediate appellate court. (Since then, Nebraska, with 1,270 annual filings, compared to 1,650 in the D.C. Court of Appeals, has established an intermediate appellate court.)

Institution of a Case Management Program in 1990 improved case disposition, but it also clearly demonstrated the limits of case management in resolving fundamental problems of congestion

and delay on appeal. Three quarters of the increase in dispositions after the first year of the Case Management Program was the result of orders disposing of old and unperfected appeals. The process of weeding out old appeals through case management continued in the second and third years. However, by 1992, the third year of the Case Management Program, the dispositions no longer exceeded the number of new filings. See Chart 2, attached.

Despite the creation of a second summary calendar and a second motions calendar and the expanded use of Senior Judges, despite improved record and transcript transmission, despite revisions in rules and policies to encourage motions practice and discourage continuances, congestion and delay on appeal persist. Furthermore, despite increased productivity through these and other case management actions, the average time for a case to be disposed of on appeal remains 22 months, almost two and one-half times the American Bar Association standard.² See Chart 3,

² Standard 3.52 (b) of the American Bar Association *Standards Relating to Appellate Delay Reduction*, Appellate Judges Conference, Lawyers Conference Task Force on the Reduction of Litigation Costs and Delay (approved by the ABA House of Delegates, February 1988), provides in part:

Compliance with the time standards enunciated for [administrative, lawyer and judicial functions] should allow intermediate appellate courts and the state's highest court to issue an opinion on appeal within 280 days of the filing of the notice of appeal.

attached.

In other words, the Case Management Program has enabled the Court to assure that its caseload is current by weeding out old and unperfected appeals and by moving simple appeals through the Court more quickly. But case management does not eliminate the caseload or the complex and important questions of law that need to be decided. Hence, the achievements of case management do not address the basic problem facing the District's highest court.

The varied responsibilities of the D.C. Court of Appeals show no signs of waning. The number of appeals has continually increased in the last two decades. In view of the caseload and expansion of the size of the trial court, the number of appeals is unlikely to diminish. The criminal and family divisions' calendars in the trial court have been expanded. Alternative dispute resolution and civil delay reduction in the trial court have not reduced the appellate caseload. Shifting more civil cases to the Small Claims Branch in the trial court still means that the appellate court will have to consider petitions for review as well as civil appeals. The D.C. Court of Appeals, as the District's highest court, also continues to have substantial non-case related responsibilities, including admission and discipline of members of the Bar, promulgation and review of rules, and oversight responsibilities for the D.C. Bar and the unauthorized practice of law.

Furthermore, the ability of the en banc court to perform its jurisprudential function remains severely hampered. Although the District's highest court is presented with the same types of legal issues as the highest courts in the states (other than questions of state constitutional law), the District's highest court has, at most, been able to sit as a full court on only 10 to 12 cases a year. With a backlog in excess of 2,000 cases, the Court, sitting in three-judge divisions, is under pressure to dispose of as many cases as it can in as short a period of time as it can. In the past twelve months, due to the pressure to decide as many cases as quickly as possible, the Court sat as a full court on only five occasions. There is a reluctance among the judges to force the full court to focus on a single appeal at the risk of further delay in deciding many other cases.

Consequently, the jurisprudential function of the District's highest court is relegated to majority votes by burdened three-judge divisions, with the unavoidable result that conflicts remain unresolved and important questions of law remain uncertain, unclear and undecided. The development of the law takes substantial judicial time, and the District's single appellate court cannot handle both a high volume of appeals in three-judge divisions -- over 1,600 new appeals annually in addition to a backlog of 2,000 cases and over 4,700 motions -- and also devote the time that is required by the full court to

address important questions of District of Columbia law.

These are precisely the circumstances that the American Bar Association has identified as necessitating the creation of an intermediate appellate court. According to the American Bar Association *Standards Relating to Court Organization* (1990 ed.):

The appellate court should fulfill the judicial functions of reviewing trial court proceedings and formulating and developing the law. Where the volume of appeals is such that the state's highest court cannot satisfactorily perform these functions, a system of intermediate appellate courts should be organized.

STANDARDS § 1.13 at 37.³ Thirty-nine states facing a similar situation have acted to establish intermediate appellate courts, enabling more cases to be decided more quickly without impeding the development of the law. The four independent studies addressing the situation in the District of Columbia have

³ The commentary on § 1.13 of the STANDARDS explains that:

Appellate courts perform two basic functions. The first is reviewing trial court proceedings to determine whether they have been conducted according to the law and applicable procedure. The second is developing rules of law that are within the competence of the judicial branch to announce and interpret.

STANDARDS at 38-39. See also, *Appellate Delay in the D.C. Court of Appeals*, District of Columbia Delay Reduction Project, Southeastern Regional Office, National Center for State Courts, volume I (July 1986) at 28-29.

concluded that the same solution is required here. The most recent statistics compiled by the National Center for State Courts, the State Justice Institute and the Conference of State Court Administrators indicate that the mandatory caseload of the D.C. Court of Appeals -- as contrasted to caseload over which the appellate court has discretion whether to accept an appeal -- is 66 percent higher than the next largest-volume court in a state without an intermediate appellate court.⁴

Under the D.C. Self-Government and Governmental Reorganization Act of 1973, Congress has retained legislative responsibility for the organization of the District of Columbia courts.⁵ This decision was made after Congress had established a state-type court system for the District of Columbia in the D.C. Court Reform and Criminal Procedure Act of 1970.⁶ In all the states with a comparable appellate workload, the state legislatures have established intermediate appellate courts. As the four independent studies document, Congress should do so on behalf of the District of Columbia.

⁴ *State Court Caseload Statistics: Annual Report 1990* (State Justice Institute, February 1992) at 78. West Virginia's highest court has wholly discretionary jurisdiction. *Id.* at 82, 164. Nevada, the next following the District of Columbia in number of mandatory filings has only 1,089 filings while the D.C. Court of Appeals has 1650 mandatory filings. *Id.* at 78.

⁵ Pub. L. No. 93-198, 87 Stat. 774. See D.C. Code § 1-233 (a)(4) (Repl. 1992).

⁶ Pub. L. 91-358, 84 Stat. 473.

When I last appeared before the Committee during the 102nd Congress, the ranking Republican member asked that I provide further justification, in addition to that in the four independent studies and testimony presented at the hearings, for the need to establish an intermediate appellate court. I have provided information, demonstrating again the need to assure that more cases on appeal are decided more quickly and to facilitate the law-stating function of the District's highest court, thereby providing direct and indirect benefits to the justice system and our citizens. In addition, I have responded to questions when I have appeared before the Committee, beginning in 1988. Moreover, in my statement of May 9, 1991, which I request be made a part of the record of this hearing, I outlined the background of the current court system, summarized the four independent studies of the appellate court, and suggested amendments to the bill. In view of the existing studies of the Court, the comparability of the jurisdiction of the District of Columbia court system and the state court systems, the similarity between the District's statutes and regulations and those of the states, combined with the substantial expansion of the size of the trial court in recent years, further study would simply confirm what is already known.

Furthermore, with the support of the Board of Judges, the D.C. Court of Appeals has implemented the various suggestions

offered for resolving the problems of congestion and delay on appeal. But, as experience in the state court systems had previously demonstrated, these piecemeal solutions are not equal to the task. Consequently, while suggestions for improved records management, use of additional judges, revisions in rules and policies have proved useful, they have not enabled the District of Columbia to have an appellate court system that is able to perform both its error review and its jurisprudential functions in a timely and appropriate manner.

Justice on appeal requires that appeals be resolved in a timely and just manner where mechanisms exist to resolve uncertainties and conflicts as well as to address developments in the law. Without an institutional structure that can fulfill its responsibilities to perform these functions, public confidence in our system of justice is not enhanced. In the classic study of justice on appeal, Professors Carrington, Meador and Rosenberg observed:

On the one hand, appellate justice is preoccupied with the impact of decisions on particular litigants, but on the other it is concerned with the general principles which govern the affairs of persons other than those who are party to the case decided. While appellate justice has impact on the realities of situations, it also affects the appearances and symbols which pervade the government. An appellate system which is unduly preoccupied with one of these functions to the neglect of the other, is inadequate to advance the purposes which

appellate courts should serve.[⁷]

Recent events have underscored the importance of public confidence in the judicial system to maintaining the fabric of our society. Those who reside in, do business in, and visit the Nation's Capitol must be assured that the appellate court, as well as the trial court, can provide for the peaceful, timely, and just resolution of societal and individual disputes. Paralleling this point, the chairperson of this Subcommittee made a similar observation during last year's mark-up when she stated: "The D.C. courts are clogged both at the top and the bottom. This bill brings relief at both ends."⁸ Respectfully, I urge the Committee to take prompt favorable action on legislation to establish an intermediate appellate court in the District of Columbia.

Thank you.

Attachments

⁷ Paul D. Carrington, Daniel J. Meador, and Maurice Rosenberg, *Justice on Appeal* (West Publishing 1976) at 3.

⁸ H.R. 568, H.R. 4721 and clean bill H.R. 5811, To create the Supreme Court of the District of Columbia, Hearing and Mark-up, Subcommittee on the Judiciary and Education, House Committee on the District of Columbia, 101st Cong. 1st & 2d Sess. May 9, 1991, Feb. 27 & Aug. 11, 1992, Serial No. 102-2, at 381.

CHART 1

D.C. COURT OF APPEALS

Backlogs, Dispositions and Filings

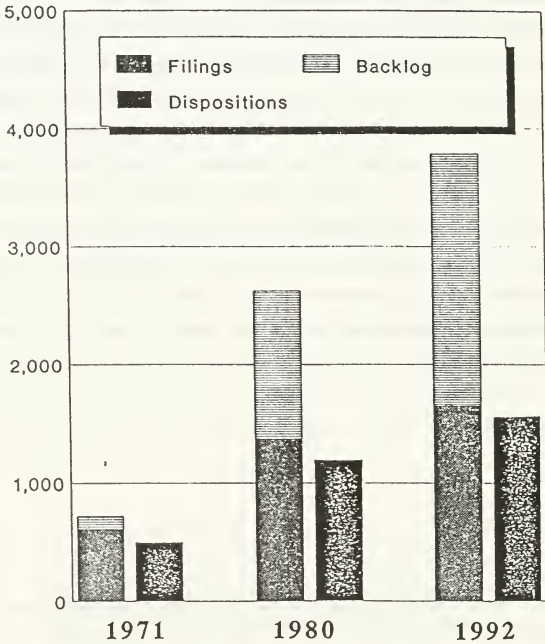


CHART 2

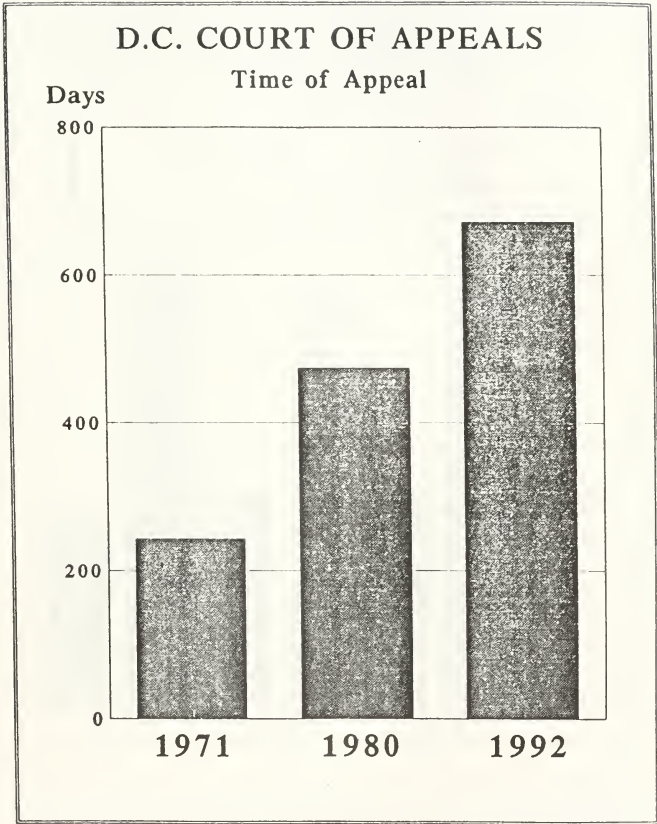
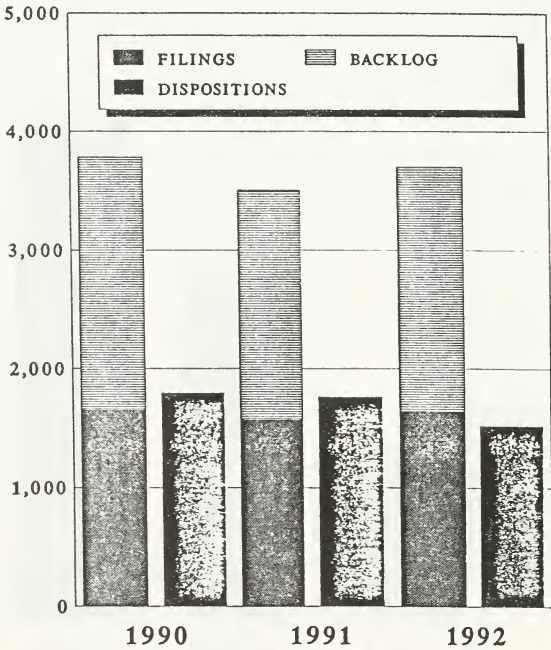


CHART 3

D.C. COURT OF APPEALS

Backlog, Dispositions and Filings



CORRECTED COPY

STATEMENT OF THE HONORABLE JUDITH W. ROGERS
CHIEF JUDGE OF THE DISTRICT OF COLUMBIA COURT OF APPEALS
to the

Subcommittee on the Judiciary and Education
House Committee on the District of Columbia
on

H.R. 568, To create a Supreme Court of the District of Columbia
and for other purposes

May 9, 1991

Introduction

It is my privilege to appear before the House District Committee Subcommittee on the Judiciary and Education regarding H.R. 568, To create a Supreme Court of the District of Columbia, and for other purposes. My remarks will focus on the proposal to establish an intermediate appellate court in the District of Columbia.

In 1970 Congress established a state-type court system for the District of Columbia in which all appellate review would be provided by a single appeals court. Four independent studies, beginning in 1979, have concluded that an intermediate appellate court is required to address the fundamental problems of congestion and delay on appeal. Despite improvements in case management and productivity by the District of Columbia Court of Appeals, the volume of appeals has continued to rise since that first study was completed and delay on appeal has almost doubled.

The number of appeals filed in 1990 increased over the number filed in 1989. In addition, the number of substantive motions increased by more than 20 percent, adding to the burden

placed on the Court. While the number of dispositions by the Court also increased, three quarters of the increase was the result of orders disposing of appeals. Some progress was made in reducing the time it takes for briefs to be filed and cases scheduled to be heard, but these achievements do not address the fundamental problem facing the District's highest court.

The number of cases awaiting decision has not diminished in the last decade in any significant amount. Case management has had the effect of shrinking the proportion of very simple cases in the Court's caseload. Motions, on the other hand, have become more complex, with many substantive motions being the equivalent of full appeals. In addition, the ability of the en banc court to perform its jurisprudential function remains severely hampered, with the Court sitting on only 10 to 12 cases a year. With a backlog of over 2,000 cases, the Court is pressed to dispose of as many cases as it can in as short a period as it can, and this does not permit time for the en banc court to address important questions of law. Furthermore, the average time for a case to be disposed of on appeal remains at 22 months, almost three times the American Bar Association standard.¹

¹ Standard 3.52 (b) of the American Bar Association Standards Relating to Appellate Delay Reduction, Appellate Judges Conference, Lawyers Conference Task Force on the Reduction of Litigation Costs and Delay (approved by the ABA House of Delegates, February 1988), provides in part:

Compliance with the time standards enunciated for [administrative, lawyer and judicial functions] should allow intermediate appellate courts and the state's highest court to issue an opinion on appeal within 280 days of the filing of the notice of appeal.

These are the circumstances which the American Bar Association has identified as necessitating the creation of an intermediate appellate court.² Thirty-eight states facing similar situations have established intermediate appellate courts, enabling more cases to be decided more quickly. The four independent studies addressing the situation in the District of Columbia have reached the same conclusion about what must be done here. The 1989 State Court Caseload Statistics compiled by the National Center for State Courts indicate that the D.C. Court of Appeals has a mandatory caseload over 50 percent more than the next largest-volume state court without an intermediate appellate court. Only Nebraska and West Virginia report comparable caseloads; Nebraska is establishing an intermediate court, and West Virginia has entirely discretionary jurisdiction,

² According to the ABA Standards Relating to Court Organization (STANDARDS), an appellate system should perform two basic functions:

1. To review trial court proceedings to determine whether they have been conducted according to the law and applicable procedure; and
2. To formulate and develop rules of law that are within the competence of the judicial branch to announce and interpret.

Appellate Delay in the D.C. Court of Appeals, District of Columbia Delay Reduction Project, Southeastern Regional Office, National Center for State Courts, volume I (July 1986) (NCSC) at 28 (summarizing STANDARDS §1.13). When the workload makes impossible the performance of both functions by the highest court in a jurisdiction, and improvements in efficiency in operations cannot be achieved without diluting the appellate functions, the ABA concludes that the appropriate solution is the formation of an intermediate appellate court. *Id.* at 28-29 citing ABA commentary on its STANDARDS §1.13.

approximately one-third of which involves workers' compensation claims.

In the 101st Congress, the House of Representatives passed legislation to establish an intermediate appellate court. I urge the Subcommittee to act promptly in order to enhance the prospect for favorable action in the 102nd Congress.

The remainder of my statement outlines the background of the current court system, the studies of the appellate court, and further amendments to H.R. 568 which should be made.

I. Background

The present District of Columbia court system was created by Congress as part of the District of Columbia Court Reform and Criminal Procedure Act of 1970.³ The Act was the outgrowth of accumulated recommendations in studies and by groups to upgrade the local courts in order to remedy shortcomings in the justice system.⁴

The Attorney General of the United States in 1972 described the old court system as

³ The D.C. Court Reform Act of 1970 transferred jurisdiction over criminal prosecutions and civil proceedings from the federal courts to a new District of Columbia Court system. It created a trial court of general jurisdiction, abolishing the several existing trial courts of limited jurisdiction, and it created an appellate court as the highest court in the District of Columbia, eliminating the discretionary appeal to the U.S. Court of Appeals for the District of Columbia Circuit. Prior to the Court Reform Act, the D.C. Court of Municipal Appeals was an intermediate appellate court.

⁴ Mitchell, Introduction to Symposium on the Modernization of Justice in the District of Columbia, 20 Am.L.Rev. (Nos. 2 & 3, December 1970 - March 1971) xiv.

unacceptable in principle and unworkable in practice. It was unacceptable in principle because a local judicial system deprived of all meaningful jurisdiction was inconsistent with developments toward self-government. It was unworkable in practice because the backlogs and delays which characterized the trial of felony cases in the U.S. District Court were rendering the system largely ineffectual.⁵

He viewed the Court Reform Act of 1970 as creating in the District of Columbia a model paralleling the judicial systems in the 50 states, eliminating the inefficiencies and inadequacies of a multiplicity of local courts, and providing "real power and stature to the local courts."⁶

The Act took into account the fact that although the District of Columbia is not a state, the litigation that comes into its courts is the same as the litigation in the state courts. Most national legislation enacted by Congress applies to the states and to the District of Columbia. Hence, the District of Columbia, like the states, is required to conform to new federal laws and regulations, and, in turn, to promulgate local regulations to carry out federal laws. With the enactment of the D.C. Self-Government and Governmental Reorganization Act of 1973, Congress delegated broad legislative powers to the District government, and beginning in January 1975, the District

⁵ Id. at xiv-xv.

⁶ Id. at xv, xvii. When Congress enacted the D.C. Self-Government and Governmental Reorganization Act of 1973, it provided that judges would continue to be appointed by the President and confirmed by the U.S. Senate but created a D.C. Nominating Commission with responsibility for submitting three names to the President for each judicial vacancy and designating the chief judges of the courts.

government has enacted many new laws, and has a code that is comparable to state codes of law. The federal and District of Columbia statutes created new rights and remedies, which, in turn, spawned litigation in the local and federal courts. Moreover, the District of Columbia has not been immune from the increase in crime experienced throughout the United States, and while the local prosecutor is the United States Attorney for the District of Columbia, the United States Attorney acts as a local district attorney in prosecuting state-type crimes in the District of Columbia courts.

II. Studies of the D.C. Court System after a decade

Ten years after the Court Reform Act, the District of Columbia Bar evaluated the District's court system. The report of the committee chaired by Charles A. Horsky focused on "[t]he efficiency and effectiveness with which the courts of the District of Columbia schedule and dispose of matters brought before them" ⁷ The Horsky Committee reached no conclusion on whether or not the 44 trial judges provided sufficient trial judicial manpower. In recognition of the substantial backlog of cases in the appellate court, however, the Committee recommended that three additional appellate judges be appointed for a temporary period. This never happened, and in 1988, Mr. Horsky testified before this Committee that such a temporary solution

⁷ Horsky, Preface to Report of the District of Columbia Court System Study Committee of the District of Columbia Bar, March 1982, prepared for the Senate Subcommittee on Governmental Efficiency and the District of Columbia, 98th Cong., 1st Sess, S.Pnt. 98-34 (April 1983) vii (Horsky Report).

would no longer suffice in view of the increase in the number of appeals that subsequently occurred. Mr. Horksy concluded that, in view of the "intolerable" delay on appeal, to rectify "the fundamental problem of a highest court of a jurisdiction not sitting in banc, . . . a Supreme Court of the District and an intermediate appellate court, with appropriate allocation of jurisdiction to each court, now appear to me to be the most satisfactory alternative to the present system."⁸

The report of a second Bar committee, chaired by John W. Douglas, addressed the workload of the D.C. Court of Appeals in 1979.⁹ The Douglas Committee concluded that "resolution of virtually all of its cases by majority vote of three-judge panels [is] an altogether unacceptable modus operandi for a jurisdiction's highest court."¹⁰ The Committee noted that "the Court's 15.5 months average delay from notice of appeal to decision is far too long, [being] roughly three times longer than that contemplated by the ABA Appellate Standards."¹¹ The Committee recommended the establishment of an intermediate appellate court in the District of Columbia. No action was taken

⁸ Testimony of Charles A. Horksy, Esq., before the House District Committee Subcommittee on the Judiciary, April 28, 1988, on H.R. 4366, at 3 (Horksy).

⁹ District of Columbia Court of Appeals: Workload Problems and Possible Solutions, Final Report of the Subcommittee on the Workload of the District of Columbia Court of Appeals, District of Columbia Judicial Planning Committee, August 1979 (Douglas Report).

¹⁰ Id. at 140.

¹¹ Id.

by Congress.

III. The Courts after two decades

In response to the large increases in the caseload of the trial court, Congress has, beginning in 1986, doubled the number of judicial officers in the trial court. There are now 59 trial judges and 15 hearing commissioners handling matters in the Superior Court. By contrast, the Court of Appeals has remained throughout its existence a court of nine judges.

The caseload of the D.C. Court of Appeals has more than tripled between 1970 and 1990.¹² Faced with increasing caseloads, the Court has implemented a number of management changes to improve the effectiveness and efficiency of its operations. Summary calendars were established, so cases could be decided quickly without oral argument or published opinions. The motions practice was expanded, to resolve cases during the early stages of an appeal. Senior judges were requested to handle additional proceedings on appeal. A case management plan was put into operation, so that the cases involving very simple issues on appeal and motions are resolved more promptly and the status of pending cases is continually monitored.

In addition, computers were installed in the Clerk's Office to expedite the handling of pleadings and to facilitate case scheduling. Word processors were installed in judges' chambers. The Court's rules were revised to reduce continuances on appeal.

¹² See District of Columbia Courts Annual Report 1971 at 5 (filings: 454 in 1970, 613 in 1971), and statistics for Annual Report 1990.

A system of advance calendaring commenced in an effort to eliminate other delays on appeal.

More than a decade of experience has demonstrated clearly that the increases in the number of appeals experienced in the past two decades have remained constant. While the number of appeals varies from year to year, the high volume of filings is not a temporary phenomenon. Indeed, the number of appeals increased far beyond what had been anticipated by a Bar Committee a decade ago.¹³ Between 1976 and 1986, appellate filings increased by approximately 34 percent. See Chart 1. Significantly, as appeals in criminal cases were increasing, the larger increases occurred in civil cases and administrative agency appeals.¹⁴ The National Center for State Courts found in 1986 that the caseload of the D.C. Court of Appeals, when compared to other state appellate courts, is "higher by far than any other court of last resort not having an intermediate appellate court."¹⁵ Its 1989 Annual Report is to the same effect.

The inevitable result, enhanced efficiency notwithstanding, is extraordinary delay on appeal: the average time a case is pending on appeal remains at 22 months even with case management,

¹³ Horsky, supra note 8.

¹⁴ Appellate Delay in the D.C. Court of Appeals, District of Columbia Delay Reduction Project, Southeastern Regional Office, National Center for State Courts, Volume 1 (July 1986) 9. (NCSC).

¹⁵ NCSC at 12.

a limit on continuances, and the assistance of retired judges. This is almost double what it was when the Douglas Committee recommended over ten years ago that an intermediate appellate court be established. See Chart 2. It is almost triple the standards set by the American Bar Association.¹⁶ Delay on appeal obviously has adverse effects on litigants trying to resolve their disputes; two years is a long time to wait, especially after experiencing delays in the trial court as well. Litigants in the District of Columbia face far longer delays than do the residents of many states.

Appellate efficiency has had other costs as well. Over the nineteen years of its existence, the D.C. Court of Appeals has understandably emphasized disposition of a greater number of simple cases which has limited its capacity to give fullest consideration to complex cases. The jurisprudential role of the en banc court is virtually nonexistent, even though, for all practical purposes, its decision in a case is the final decision. The jurisprudential role of the District's highest court is, as the Douglas Report decried more than a decade ago, relegated to a majority in panels of three judges rather than the full court.

Furthermore, such success as the court has experienced in disposing of an increased number of appeals, has required extraordinary commitments by the judges.¹⁷ In 1990, the judges produced 20 percent more published opinions than in the preceding

¹⁶ See note 1, supra.

¹⁷ NCSC at 19 (Table 9).

year. How long the pressure on the judges to increase their productivity can be effectively maintained is unclear. The issues raised on appeal are not easily resolved, the motions work becomes more complex, the backlog remains. As litigants become increasingly wary of delays, requests for expedited consideration tend to increase over and above the cases which the Court is required by statute to address on an expedited basis, adding to the pressures on the judges.¹⁸ Of course, by expediting one case, the resolution of other important cases is further delayed.

IV. The need for an intermediate appellate court

Twenty years ago the state appellate court systems were more like District of Columbia Court of Appeals today. However, today, the overwhelming majority of states have restructured their appellate courts: an intermediate court handles appeals involving new facts applied to settled law, the error-review function of the appellate court; the highest court handles appeals raising new and important questions of law, the jurisprudential function. The experience in other jurisdictions demonstrates that where intermediate courts of appeals exist, more cases are decided in less time without sacrificing the

¹⁸ A recent example involves the *Washington Post* reporter who was held in contempt of court for failing to reveal a source. Her attorney sought immediate relief in the appellate court as soon as the trial judge indicated that he would order the reporter to testify. A three-judge division heard the motion for a stay. After the trial judge held the reporter in contempt, her attorney filed an appeal and requested that the appeal be handed on an expedited basis; the division granted expedition and will determine the course of further proceedings.

jurisprudential function of the highest court.

In 1986 the National Center for State Courts studied the District of Columbia Court of Appeals, and concluded that serious consideration should be given to the establishment of an intermediate appellate court.¹⁹ It proposed a high court of seven judges who would always sit en banc, and an intermediate court of nine judges who would sit in panels of three. Appeals to the highest court would be discretionary. To avoid unnecessary delay, the National Center proposed a single clerk's office to serve both appellate courts. As briefs were filed the clerk would screen the cases pursuant to guidelines established by the highest court, and send the cases to the appropriate court. Thus, unnecessary delay would be avoided when it is clear the highest court should initially hear a case. This "pass through" procedure allows the highest court to consider cases expeditiously and enables more judges to focus on the initial appeal.

In 1987 and 1988, the organized and voluntary Bars of the District of Columbia conducted their own studies of the D.C. Court of Appeals. Both studies concluded that an intermediate appellate court was required. These studies, as well as the studies by the National Center for State Courts in 1986 and the earlier D.C. Bar Douglas Report, concluded that other suggestions for reducing appellate delay and congestion will not meet the

¹⁹ NCSC at 3.

court's needs.

For example, adding judges to the current Court of Appeals will exacerbate the present congestion and delay without separating the responsibility for jurisprudential and error review decision making. Retired judges with senior status have been called upon to provide additional assistance to the court, but they cannot be expected to carry the caseload of an active judge or provide the needed full-time judicial resources. Jurisdictional limitations offer no solution. Criminal cases involve approximately 65 percent of the Court's workload;²⁰ two thirds of the criminal convictions were appealed in 1989, 74 percent were appealed in 1988.²¹ Similarly, appeals in juvenile delinquency, domestic relations and other cases involving families, are hardly likely to decrease in view of the explosion of cases in the trial court. There also is no indication that the steady stream of civil litigation -- negligence, contracts, malpractice -- will decrease in the foreseeable future; indeed, the effort by the trial court to meet ABA time standards, through adoption of an individual calendar system in the Civil Division, is likely to bring appeals to the appellate court more quickly than in the past.

The D.C. Court of Appeals has also addressed the suggestions and concerns expressed by the U.S. Department of Justice in its letter of November 14, 1989, to the then ranking minority member

²⁰ NCSC at 24.

²¹ District of Columbia Annual Report 1989 at 25.

of the Subcommittee. Reforms relating to transcripts and records, case management, and briefing schedules have been implemented. The court has adopted a more stringent continuance policy and made greater use of retired judges. Nevertheless, the volume of cases awaiting decision on appeal remains fairly constant; case management does not cause the cases to disappear. There are over 2,000 cases in the backlog; approximately 1,600 new appeals are filed annually, in addition to 1,700 motions raising substantive issues, and 4,500 procedural motions. Even with the records and transcripts and briefs available at an earlier stage, the judges still have to decide the cases. Thus, the delay would simply move from the early stages on appeal to the later stages, when the judges have to decide the cases. Moreover, the workload statistics do not reflect the time that the Court devotes to deciding petitions for rehearing and rehearing en banc, to the promulgation of rules for the courts and the Bar, and to other assignments associated with the courts, including the review of applications for allowance of appeals.

The District's highest court is not analogous to the federal circuit courts of appeals, and the District's courts do not function in the same manner as federal courts. The circuit courts of appeal are intermediate appellate courts, whereas the D.C. Court of Appeals is the District's highest court. As the District's highest court, the D.C. Court of Appeals already devotes time to consideration of petitions for review, and hence concern that the highest court would assume a new discretionary

review function were an intermediate appellate court established is factually flawed. Equally flawed is the analogy of the District's highest court to the U.S. Supreme Court; the appropriate analytical framework is the state court system, where the experience is quite different, the 1989 Annual Report of the National Center for State Courts indicating that the highest courts in the states granted an average of only 14.3 percent of discretionary appeals in 1989, as compared with 5 percent for the Supreme Court of the United States. Furthermore, despite overlap in some areas, the caseloads of the local and state courts are fundamentally different from the litigation in the federal courts.

The U.S. Department of Justice appears in the local courts only as the local prosecutor, who has virtually no right to appeal. The Department is not involved in workload of the local courts in civil, domestic relations, tax, probate, landlord and tenant, juvenile delinquency, child neglect and abuse, small claims matters, nor in appeals from decisions by the administrative agencies of the District government. Although it is to be assumed that the Justice Department supports the prompt resolution of appeals in criminal cases and the delineation of clear rules of law, its position suggesting that lesser measures can resolve the fundamental delay and congestion problems in the D.C. Court of Appeals assures precisely the opposite result. Leaving issues of law unsettled deprives the courts, the Bar, and the public of guidance, and assures more litigation seeking

resolution of those issues, and still more delay.

The suggestion by the Justice Department that the District's highest court model its jurisprudential role after that of the Ninth Circuit Court of Appeals also offers no solution. The Ninth Circuit's predicament is unique in the federal courts, and is hardly an ideal solution even for the federal system of intermediate appellate courts. To suggest that the District's highest court adopt that model invites replication of the problems in that circuit rather than a solution and, again, ignores the fact that the D.C. Court of Appeals is not an intermediate appellate court.

V. The 102nd Congress

In sum, in 1970 Congress provided a state-type court system for the District of Columbia which has achieved many of the goals of its proponents. The circumstances faced by the District of Columbia courts are similar to that of the state courts, and those circumstances have produced the need to update the District's appellate court structure. Since 1970, intermediate appellate courts have been created in 16 states, bringing the total number of states to 38.

The creation of an intermediate appellate court would not enlarge the power of the current appellate court. Experience in the states indicates, moreover, that the additional level of appeal would not increase delay; quite the contrary. Rather, it would enable that court to perform effectively the jurisprudential role and assure that the error-review function

was performed in a timely manner. Under the current structure, a single court is asked to do both functions, and the pressures of the caseload have meant that the court has been forced largely to forego its en banc jurisprudential role in an effort to avoid increasing delay and the backlog.

Experience in the trial courts and the administrative agencies of the District government offers no basis on which to project a decrease in the demands on the appellate court in the foreseeable future. Indeed, with the addition of eight trial judges and more police officers and prosecutors by the 101st Congress, as well as the additional trial judges and magistrates provided in H.R. 568, the impact will be felt in the appellate court's workload.

The studies have been done; the need is clear. Alternatives have ultimately proved ineffective in the state court systems, and the studies document why lesser measures would not solve the fundamental problems of congestion and delay here. As the testimony before the 100th and 101st Congress has revealed, the support for the creation of an intermediate appellate court is virtually unqualified among officials and members of the District of Columbia community.

VI. Amendments of H.R. 568

The amended version of H.R. 568, dated April 9, 1991, incorporates most of the amendments recommended in the 101st Congress by the Bar Association of the District of Columbia. Accordingly, my remarks are addressed to the April 9th version of

the bill.

First, H.R. 568 should be amended to provide, in accordance with the recommendation of the National Center for State Courts, for a single appellate clerk. This will eliminate unnecessary filings and associated costs to the litigants. It will eliminate the unnecessary costs of creating two separate clerk's offices for the appellate portion of the court system. Most importantly, a single clerk's office will enhance the screening and referral of cases to the appropriate appellate court. This is an important amendment.

Second, the administrative structure of the District of Columbia court system needs to be revised in accordance with the structures that exist in every other court system. In February 1990, the American Bar Association strengthened its Standards Relating to Court Organization, drawing on the experiences of the courts over the past fifteen years as well as the private sector, in emphasizing the importance of placing the administrative responsibility for the court system in the highest court, acting through its chief justice.²² Attachment 1 summarizes the administrative structures of the state court systems. There is no principled basis on which the District of Columbia court system should be different. The Report of the 1988 Study Committee of the District of Columbia Bar has documented that the current administrative structure does not assure that the

²² ABA Standards Relating to Court Organization (adopted by the House of Delegates, February, 1990), §§ 1.32, 1.33.

interests of the court system as a whole will be addressed. H.R. 568 would perpetuate that structure and its deficiencies.

Accordingly, H.R. 568 should be amended to conform to the provisions of H.R. 3470 as reported by the Subcommittee during the 101st Congress. In any event, H.R. 568 should at least assure that the highest court has no less than a majority vote on the Joint Committee.

Third, the bill should provide that the rules of the intermediate appellate court, like those of the trial court, shall be subject to approval by the Supreme Court of the District of Columbia. Having the highest court in a jurisdiction approve the rules is a fairly standard provision and, indeed, is a part of the current law in the District of Columbia. H.R. 568 should be amended to provide that the rules of the D.C. Court of Appeals shall be subject to the approval of the Supreme Court of the District of Columbia.

Fourth, H.R. 568 should include a severability clause. This is a fairly standard provision and would eliminate unnecessary litigation in the event any provision of the enacted bill is subsequently declared invalid by a court.

Fifth, the bill should clarify that retired justices of the Supreme Court who are designated to serve as senior judges of the D.C. Court of Appeals shall continue to receive retirement benefits based on their status as retired justices of the Supreme Court. A similar provision should make clear that judges who have retired from active service on the D.C. Court of Appeals

prior to the effective date of Title I of the H.R. 568 shall continue to receive retirement benefits based on their status as retired judges of the District's highest court; hence, all senior judges who have retired from the Supreme Court or its predecessor, the D.C. Court of Appeals before the Supreme Court was established, shall receive retirement benefits on the same basis.

Sixth, the bill refers to "decrees" of the Supreme Court and the D.C. Court of Appeals. (Sec. 103 (b) (2), on page 16, line 16). Since these courts only issue orders or judgments, the word "decree" should be struck.

Seventh, the transition provision is unnecessarily cumbersome. Since the only matters to be decided by the courts involve the arrangement of the clerk's office and the provision of space, there is no need for a special committee to be established. H.R. 568 should be amended to place transition responsibility in the Chief Judge of the D.C. Court of Appeals.

Eighth, the effective date provision for Title I of H.R. 568 contains, in subsection (b) of § 105 of the bill (on page 30), a holdover from a prior bill which no longer is appropriate. As drafted, the courts would be subject to the new administrative procedure while the incumbent Executive Officer, for so long as he holds the position, would be subject to the current administrative procedure. Subsection (b) of § 105 should be deleted as unnecessary.

Ninth, the current provisions for use of Hearing

Commissioners in the trial court have evolved in a very short time from providing commissioners to hear child support cases to commissioners who make many important decisions directly affecting litigants. They are, however, not independent decision makers, but work as aides to the trial judges. Under current law, a decision of a Hearing Commissioner is not directly appealable; review must first be sought before a trial judge and the appeal can be taken only from the trial judge's order or judgment. H.R. 568 would make a fundamental change in the current system in at least two respects.

One, decisions of magistrates would be directly appealable. Hence, the size of the trial court would have expanded, for purposes of appeal, from 62 trial judges to 82 judicial officers. H.R. 568 should be amended to provide, consistent with current law, that a decision of a magistrate must be reviewed by a trial judge before an appeal can be taken to an appellate court.

Two, the jurisdiction of the magistrates under H.R. 468 has the effect of creating a municipal court, thereby eliminating the trial court of general jurisdiction created by the 1970 Court Reform Act. The appointment power for selection of the magistrates, who would be judges in all but name, is vested in the trial court. This may present a separation of powers issue. Furthermore, the delegation of authority to the Board of Judges of the trial court to decide the scope of the magistrates' jurisdiction may present questions regarding the delegation of legislative authority; whether and to what extent there will be a

municipal court would appear to be decisions for the legislature, not the trial court.

Accordingly, before the trial court of general jurisdiction is abolished, further study of the needs of the current trial court and the appropriate role for non-judges would appear warranted. H.R. 568 calls for a study after the fact; the study should precede a fundamental change.

Thank you for the opportunity to present this statement.

Ms. NORTON. Judge Ugast, you may proceed.

STATEMENT OF HON. FRED B. UGAST

Judge UGAST. Good morning and thank you for the opportunity to appear before the subcommittee this morning to testify regarding H.R. 1633, a bill to create a supreme court for the District of Columbia and for other purposes. My remarks will be directed to title II in support of the creation of two additional judicial positions in each of the next 2 fiscal years and to urge the adoption of supplemented amendments to D.C. Code 11-1732 with respect to hearing commissioners as amendments to this bill.

With respect to title II, I have submitted a formal written statement and I would ask that it be made a part of the record.

Ms. NORTON. So ordered.

Judge UGAST. I believe a brief summary of what is happening at the trial court level demonstrates the need for additional judicial positions and I have outlined in some detail what has been happening and the steps we have taken in each of the divisions of the court to meet our increasing case load.

Case Load

Suffice it just to say, if I might, that two new legislative initiatives in 1992 have continued to add even more to the court's criminal workload. One was the Prevention of Domestic Violence Act and the other is the Bail Reform Act. We have received probably in excess of a thousand additional cases under the Domestic Violence Act principally in the misdemeanor side as well as some felonies and it has had a concurrent impact on the family division with respect to the request and petitions for civil protection orders.

The Bail Reform Amendment Act has presented additional pressure on the court in the felony area by reason of the short deadline that the cases must have. Where an individual is pretrial detained, the cases must be tried within 100 days.

In the family division, as I say, the juvenile delinquency cases have reached about 5,000, but even more disturbing has been the rise in neglect case filings, in the interfamily offenses. It went from about 850, I believe the previous year, to almost 1,400, so we have had to take steps to try to increase the number of calendars to be able to process these cases and as I say the Domestic Violence Act has affected the family division as well.

Paternity and child support is an area where the commissioners do sit in substantial numbers and has increased so that our collections were \$42.6 million in 1992, which assists our city under the 4-D program in the funds we get.

Our Civil Delay Reduction Program on the civil side has continued to be successful and we are coming closer and closer to meeting the standards of the ABA and as you know, the utilization of ADR has played an integral part in that effort.

So, I would just say in light of the increased activities in all of the divisions and the impact of the new legislation, section 202 of H.R. 1633 providing for additional judicial positions is fully warranted.

Night Court

If I might just a word on section 203, the feasibility of establishing a District of Columbia night court. We have studied that and made reports to the Mayor and we have looked at it rather substantially in terms of what might be most helpful to the court and the community. I think some of it involves really the definition that one puts on night court. We had what we considered expanded papering hours, extended papering hours whereby the United States attorney, the prosecuting office, and the police department handled the papering of cases of arrests that occurred up until 9:30 or 10 at night and the court was open to the extent that the clerk's office was required to assist particularly in the warrant office.

That was stopped because of cost-effectiveness and demands particularly an increase, a tremendous increase in first-degree murder cases and the grand jury responsibility so that the prosecutor's office decided at least at that point in time to cease doing it.

I think I have suggested to the new chief of police and will suggest to the United States attorney and have suggested to the United States attorney's office that that be looked at again with consideration being given to expanding those hours closer to midnight where there would be additional arrests involved and more individuals would be affected by that.

The night court, which really doesn't affect the police officers being there because it would involve arraignments, at least the way it was discussed at one point, has some cost aspects to it. Certainly it does involve liberty interests and to that extent has merit.

I just have suggested and I am looking at with our clerk's office the likelihood and the possibility of really having some extended court hours where we would run several trial courts beginning around 3:45 or 4 o'clock and run them until 10 o'clock. One, it would help us from a courtroom standpoint/space standpoint and would also in certain courts, nonjury courts, permit us to have trials at that time.

So I am suggesting that I think that flex time and the possibility of extending the papering hours probably would be more productive in the long run than a night court which would just be for arraignments and presentments.

Hearing Commissioners

I would now like to turn if I might to the hearing commissioner statute, 11-1732. I strongly recommend certain limited amendments to that section which provides—which governs the use of hearing commissioners in the superior court.

I believe it would be helpful to assign some additional hearing commissioners at this time, with limited broader authority in certain areas, which would enable us to redeploy some judges that are currently assigned in those areas. The existing statute permits commissioners or magistrates to perform all the duties required at this time except as to probate and tax matters with a need for some clarifying language with respect to the new referrals. That is the initial hearing for juveniles and neglect family proceedings and the establishment of paternity as a basis for child support.

I have attached to my statement some suggested amendments to 11-1732 changing the title of the position of hearing commissioner to judicial magistrate, expanding the duties to include the authority to preside over proceedings involving uncontested probate and tax and fiduciary matters and clarifying language with respect to new referrals in juvenile and neglect cases and the establishment of paternity in child support cases with conforming amendments.

If I might just before closing, just say a few words about some of those changes. The hearing commissioners have served the court in a variety of settings and greatly facilitate the processing of our heavy case load. Since 1964 I think sometimes we forget that the first hearing commissioner was appointed in the family division. I have outlined in some detail, which I hope would be helpful, the history of the development of the hearing commissioners and how then in 1982 we started using hearing commissioners on the criminal side and then have expanded their utilization in the court to assist the judges.

There is a finite number of judges that can either be utilized or can be afforded and I recognize that and believe that we have to work toward other ways and other efficient methods in order to accomplish what we are trying to do. But there is clearly finite numbers on judges and the numbers that can be utilized or can be afforded.

Let me say, for example, that the volume of cases handled by the commissioners in 1992, they heard 40,817 arraignments and presentments and disposed of 20,800-some nonjury misdemeanor and traffic cases.

In the family division, they disposed of some 4,500 of child support matters, and 2,100 uncontested divorce matters. We are now utilizing the commissioners with consent in the small claims branch which incidentally I wholeheartedly support as the board of judges has the raising of the jurisdictional amount to \$5,000 as contained in H.R. 1631 which I believe the chairperson has introduced.

There was some 29,000 cases filed in the small claims branch of our court. Recently we have set up a separate calendar dealing just with collection and subrogation cases up to \$25,000 and have set up a calendar which is presided over by the commissioner.

Now, let me just mention the change of title, if I might.

It is important, I think, that the judicial officer's title should provide the public with an accurate idea of the function served by that officer. The title "hearing commissioner," which was once appropriate for the position, I don't believe is sufficient any longer. It just doesn't denote an official who has the authority to adjudicate disputes.

The commissioners now fully adjudicate certain types of disputes by entering final orders and judgments. I think it is important that their title indicate this to the public. I am recommending or suggesting the term "District of Columbia Judicial Magistrates." I think the term "magistrates" denotes a public official authorized to exercise judicial authority.

I think it is important to the perception—to the public's perception of these judicial officers because the people who come before them, whether it be in child support or small claims or in traffic, is dealing with the citizen in fairly substantial volumes. It is impor-

tant that they have a sense that the matter is being handled by a judicial officer fully empowered to address their needs.

I think it would demonstrate that the court recognizes the importance of the issue that the citizen is bringing to the court. I have been told that, at times, there is some confusion with people: What is a hearing commissioner? Is that like a judge? So that I think it is important, particularly in the perception.

I guess I can best summarize that by saying I think the term "judicial magistrate" or something like that more accurately reflects the responsibilities and duties of the office.

I think it will assist in efficient processing of cases because it will make it clear to the public that where we are asking the commissioners to adjudicate disputes that they will be encouraged to consent to have matters heard by these judicial officers and that will enhance their ability to assist the judges in reducing our case load.

Actually, Congress recognized this when they changed the title of "commissioner" to "magistrate" in 1968 and then from "magistrate" to "magistrate judge" in 1990 on the Federal side. I think, again, one of the principal reasons for that change was to indicate and more accurately describe the responsibilities of the office.

With respect to the other changes in this authority, it is very limited and would deal only—change in authority would really be with respect to uncontested probate and tax matters. Then, in the more general terms, with the consent of the parties that the magistrates could hear probate and tax matters with the consent of the parties.

The other two are clarifying recommendations for the new referrals in the juvenile and neglect initial hearings and to also decide paternity as a basis for the child support orders they hear without consent.

I just believe, with these few amendments, that the court would be better able to effectively use these judicial officers to help us in meeting the demands that the court is facing and would complement fully the judges in their responsibilities.

Thank you very much.

[The prepared statement of Judge Ugast with attachments follows:]

TESTIMONY OF
CHIEF JUDGE FRED B. UGAST
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
BEFORE THE
SUBCOMMITTEE ON JUDICIARY AND EDUCATION OF THE
HOUSE COMMITTEE ON THE DISTRICT OF COLUMBIA
April 28, 1993

Thank you for the opportunity to appear before the Subcommittee this morning to testify regarding H.R. 1633, a bill to create a Supreme Court for the District of Columbia and for other purposes, and H.R. 1631, a bill to increase the jurisdictional amount permitted for cases in the Small Claims Branch.

In October, 1989, I was privileged to appear before the Subcommittee on Judiciary and Education of the House of Representatives to testify concerning H.R. 3470, the D.C. Judicial Reorganization Act of 1989. At that time, I advised the subcommittee that the Superior Court needed 15 additional judges and that there was no need for specific new legislation to increase the number of hearing commissioners, but certain limited modifications to the existing statute were indicated.

While no further action was taken by the subcommittee on H.R. 3470 in that session, the Congress enacted separate legislation in November, 1989, adding eight new judges to our court. In March of 1990, H.R. 3470 was revised, and the changes were incorporated into a similar version designated H.R. 4257. Ultimately, further revisions were made and H.R. 4257 was enacted by the House of Representatives in the fall of 1990, but was not taken up by the Senate. A nearly identical bill was reported out by the House committee in 1992 carrying the designation H.R. 5811, but with

Title III dealing with hearing commissioners deleted, and an identical bill was introduced in the Senate as S. 2869.

All of those prior bills in the House contained a Title II identical to Title II in the present bill - H.R. 1633 - providing additional judicial positions, but all except H.R. 5811 also contained a Title III providing for expansion of the authority of hearing commissioners and other changes.

For some reason, the provisions relating to hearing commissioners were omitted from H.R. 5811 and S. 2869, and none is contained in H.R. 1633. I have consistently over the years taken the position that there was a strong need for certain limited modification to the existing statute including a change in title of the position to "judicial magistrate".

To the extent provisions of this bill were intended to assist and support the trial court in these present difficult times of burgeoning caseloads arising from the drug-related violent crime in our city, it is important that the limited amendments to D.C. Code §11-1732 be included with the provisions for additional judges in Title II and to compliment that section.

My remarks will be directed to Title II in support of the creation of two additional judicial positions in each of the next two fiscal years and to urge the adoption of some limited amendments to D.C. Code §11-1732, with respect to hearing commissioners, as amendments to this bill. I also wholeheartedly support H.R. 1631.

TITLE II - JUDGES OF THE DISTRICT OF COLUMBIA COURTS

TRIAL COURT OPERATIONS AND CASELOAD

I believe a brief summary of what is happening at the trial court level demonstrates the need for the additional judicial positions.

CRIMINAL DIVISION

Felony indictments have increased by almost 300% in the last 15 years from slightly over 3,000 in 1978 to greater than an average of 8,600 annually filed in the last four years. Pending felony caseloads remain at high levels with almost 3,700 pending cases at the end of 1992. However, there may be some good news. While crimes of violence and drugs continue to plague our community, in 1992, the court experienced a small decrease in the cases filed in these categories. Homicide arrest rates were down with homicide indictment filings decreasing by 50 cases. In addition, drug distribution cases decreased slightly to 50% of the total felony indictment filings.

To handle burgeoning caseloads, the court sought and was granted additional judgeships. In 1978, only ten judges were assigned to criminal felony calendars. With the addition of eight new judgeships, approved in the fall of 1989, but not confirmed and assigned to calendars until October, 1990, the court has increased the number of felony calendars to 21.

Recognizing the problem of violent and serious crime, the court has initiated efforts to insure these cases are swiftly addressed. The court has created two additional felony I calendars to address the almost 100% increase in the homicide and other violent crime cases assigned since 1988. Accelerated felony trials have been expanded from three to four calendars in order to expedite cases involving violent crimes committed with a firearm.

The expansion of the accelerated felony trial calendars is not the only initiative by the court to comply with the ABA's standards for trial disposition. To address the serious increase in drug related crime, the court has recently received grant funds through the State Justice Institute to develop a specialized felony drug case management system. This system will afford earlier dispositions which will permit increased trial time on individual criminal calendars. One developmental calendar has been in operation since late 1992 and it is our ultimate goal to have three master felony drug calendars supported by nine individual trial calendars. The grant program will fund the installation of computers in the twelve felony II criminal courtrooms which will assist in immediate calendaring and docketing of courtroom results.

In spite of these additions, felony caseloads continue to be burdensome. As in previous years, the impact of the efforts of the local law enforcement and the U.S. Attorney's Office to address the drug epidemic and crime rate continues to increase the court's

workload.

Two new legislative initiatives in 1992 continue to add even more to the court's criminal workload. The recently passed Domestic Violence Act has significantly added to this growth. The court received 1,416 Domestic Violence Act filings in 1992 and we expect, based on this rate, to receive significantly more cases once every police district completes training on enforcement of the law. The court has received no additional staff or judicial resources to address this caseload increase. Presently, the court is using senior judges to assist with this new caseload. The court has received grant funding to develop a more efficient domestic violence case processing structure and will be initiating an interagency effort in the near future.

In addition, the Bail Reform Amendment Act has presented serious dilemmas for the court in processing our felony caseload. As I advised the committee in December, 1991, we expect an annual increase of approximately 700 pre-trial detention cases just in those matters in which the defendant is charged with a crime of violence committed with a firearm.

Most importantly to the court's administrative processes, it would require the pre-trial detention cases to be tried within 100 days, with an extra 20 days allowed only for good cause shown. This will mean a greater percentage of the court's criminal

caseload must be tried faster with no additional judicial or support staff. If we are unable to meet these deadlines, demonstrably dangerous defendants will be released. Without such additional resources, non-pre-trial detention cases are certain to backlog and take longer to adjudicate.

It is not only the most serious criminal cases that are creating a strain on the court's resources. U.S. Misdemeanor filings increased by almost 1,900 cases in 1992. Misdemeanor calendars are averaging over 600 cases in spite of the fact that a manageable calendar should be no more than 350 to 400 cases.

In 1992, drug related crime continued to decline in arrestees who tested positive for drugs. However, drug related crime continues to be a predominant part of the court's caseload.

The following table reflects the drug test results for adult arrestees over the past four years:

	<u>1989</u>	<u>1990</u>	<u>1991</u>	<u>1992</u>
Positive (any drug)	67%	56%	54%	50%
Cocaine	62%	53%	51%	46%

It is imperative that the court, while faced with burgeoning violent cases, employ sophisticated methods to manage all aspects of the justice system.

SOCIAL SERVICES DIVISION1992 Caseload

The court's Social Services Division continues to experience difficult workloads. In 1992, the Division received 8,239 new adult and almost 1,000 new juvenile supervision cases. At the end of the year, there were 10,508 adults in supervision and 767 juveniles. In addition, the Superior Court has been continuing its innovative programs in finding alternatives to incarceration.

Alternatives To Incarceration Programs

While there has been significant public attention addressed to the Mayor's proposal for a "Community Corrections Act" that would allow greater opportunities for such alternatives, it is important to note the groundbreaking work that is already being accomplished in this area. The Social Services Division is providing more intermediate sanctions programs to assist in reducing the district's cost of incarcerating individuals convicted of crimes by offering monitoring, supervision, treatment, and counseling programs. Such programs include:

- adult home detention;
- adult intensive probation which had 157 new cases assigned in 1992 and at the end of the year had an ongoing caseload of almost 100 adults. This program diverts offenders from incarceration at an approximate cost of \$25,000 per year which saved the district

- almost \$4 million in 1992 in incarceration costs;
- high intensity treatment supervision which diverted 230 additional juveniles in 1992 from incarceration and at the end of the year had increased its ongoing caseload by 14% to 174 cases. This alternative program diverts offenders at an approximate juvenile incarceration cost of \$40,000 per year which saved the district over \$9 million in 1992 in incarceration costs;
 - adult and juvenile community services which place offenders in community service work sites;
 - family counseling;
 - a recently initiated innovative program of video teleconferencing for the purpose of conducting presentence interviews. By creating a video link between the Social Services Division at 409 E street, N.W., and the D.C. Jail and the Lorton, Virginia Correctional Facility, 98% of presentence investigation interviews can be conducted without any probation officer travel or security risks.

Probation and Parole Resource Center

Another unique diversionary program in the Social Services Division is the innovative \$1.35 million grant program to establish the interagency Probation and Parole Resource Center. The Social Services Division, in conjunction with the D.C. Board of Parole and the Alcohol and Drug Abuse Services Administration (ADASA) of the

D.C. Department of Human Services is now in its second year of operation of this effort. The PPRC program which serves to divert and treat 330 drug offenders per year saves the district incarceration costs and is making significant strides in returning the diverted individuals to productive lives. The court's sole funding for this program has been derived from grant sources which are beginning to lapse. At a time when incarceration alternatives are being considered and treatment programs are being reduced, this effort serves as a last chance for many offenders before more expensive incarceration is incurred by the district.

Given the budget constraints of the past few years, these innovations have been accomplished in part by moving probation officers who are needed for other essential service, including supervision of probationers and pre-sentence investigations. All of these programs are placed at risk by ongoing budget problems and reductions, and I fear that the next rounds of cuts in social services will be in areas which every member of the Council would consider essential.

Child Abuse Counseling

While not a diversionary or alternative to incarceration program, another area of concern in the Social Services Division is the growth in the child abuse caseload. As mentioned earlier, the district is experiencing a problem of record proportions in the increase in abuse and neglect cases. There was a 62% growth in

caseload with almost 1,400 abuse and neglect cases filed in 1992. In addition, there has been a 165% growth in this caseload since 1987. This increase is having a serious operational impact in the Social Services Division which currently is responsible for diagnosing and supervising approximately 420 physically and sexually abused children in the district. The present caseload is almost twice the national norm.

Domestic Violence Intervention Program

The domestic violence intervention program is a new comprehensive effort to address this expanding caseload. Currently, the program is handling 600 cases and includes a 12 week counseling and treatment effort for batterers, sessions on empowering and assisting victims, staff training, and establishing community based treatment with other service organizations.

All of the innovative programs in the Social Services Division are aimed at creating efficient methods of addressing a workload burden that continues without abatement. Without proper support, the district will discover they must provide more expensive options.

FAMILY DIVISION

In the Family Division, juvenile caseload continues unabated, the new Domestic Violence Act increases domestic caseload as well as the criminal side, and we continue to see progress in paternity

and support collections.

Juvenile And Neglect Caseload

Juvenile cases are continuing their steady increase. Almost 5,000 cases were filed in the court in 1992. In addition, the pending caseloads in these calendars increased by 21% during 1992. The crimes committed by these juveniles are growing in severity. For example, acts against persons increased by 21%. Armed/violent robbery increased 36% and assault referrals rose by 22%. These are staggering and highly disturbing trends in violence which are being displayed.

The number of neglect case filings increased in 1992 to 1,351 cases representing a 62% increase in one year. This represents a serious concern to the court as it funds attorneys through its CCAN program to represent indigent parties and children in abuse and neglect cases. The degree of increase suggests there may be deficiencies in this appropriation as the year progresses.

The court has adjusted its individual calendar systems. The court has expanded its two juvenile individual calendars and added a recent individual neglect calendar and individual domestic relations calendars.

The court also recently opened its new juvenile and "At-Risk" detention facility. This allows the court to honor Department of

Justice mandates to have sight and sound separation of juveniles from adults and insures the district avoids federal penalties.

The following table represents the drug test results for juvenile arrestees over the past four years:

	<u>1989</u>	<u>1990</u>	<u>1991</u>	<u>1992</u>
Positive (any drug)	23%	16%	19%	29%
Cocaine	18%	11%	10%	07%

In 1992, the use of marijuana among arrested juveniles continued the rise noted in 1991 with 25% testing positive for use of this drug. Only 7% tested positive for cocaine.

Domestic Violence Act Cases

As an additional program concern, the court must address the staffing needs to implement the council's recently passed "Domestic Violence Prevention Amendment Act" (D.C. Code Sec. 4-131, 16-1001, 16-1031 To 1034, and 25-581 Supp. 1991). This statutory change has resulted in a dramatic increase in the domestic violence caseload for the Family Division. The largest proportion of domestic violence case activity results from "pro se" requests for a protection order. This is a time consuming and sensitive task for which the court received no staff or funds. In 1990, the division handled all CPO case processing activity for 2,221 requests or approximately 185 requests per month. The division handled approximately 3,000 requests in 1992 or 250 requests per month for

CPOs, which represents a 35% increase in case activity since the legislation was enacted.

Paternity And Support

The court has also created efficiencies in its processing of paternity and child support cases increasing collections to over \$32 million in 1990, \$36 million in 1991, and \$42.6 Million in 1992 and assisting the district in meeting its federal mandates in the IV-D program area and avoid over \$1 million in penalties. Paternity and child support filings rose by 17% to almost 6,000 cases.

The court also instituted a spanish language component to its child support hotline which broadens access to the court's child support information to members of the Washington Metropolitan Area Latino communities. While we receive 75 calls daily on the spanish language hotline, the regular child support hotline receives 1,200 calls daily and provides the public with invaluable 24 hour access to support account information.

The court is also exploring efforts with the Department of Human Services to receive federal funding assistance in IV-E cases. The court will be sponsoring a review of this program at its upcoming judicial training program. However, child support cases are an increasing caseload and concern. Without additional program support many of the advances created in recent years by the court

in this area are in jeopardy.

CIVIL DIVISION

Apart from the criminal justice side, I am pleased to report on the continuing success of our civil delay reduction program. This nationally recognized Superior Court program has made a major impact on pending civil caseloads and processing time in the district. Since January 2, 1991, when the court implemented the program, the pending caseload has been reduced by almost one-half. In 1992, the pending rate has been reduced by about 30%.

In addition, there has been dramatic progress in the pace of disposing of civil cases in the District of Columbia. In 1989, prior to implementation of the new case processing structure, only 46% of the caseload was disposed in less than one year. Only 72% of the caseload was disposed in less than two years. However, with the development of this new program, cases are being resolved much faster. As an example, of the approximately 8,500 new civil cases filed in the initial six months of 1991, 83% were disposed in less than one year and 87% were disposed in less than 18 months.

While the court is pleased with this success and the benefits that are provided to district citizens by much quicker resolution of their civil disputes, the delay reduction program is still in a very vulnerable state. Civil filings continue unabated. In 1985, there were 9,475 civil action filings. In 1992, the division received the greatest number of civil action filings in the history

of the Superior Court. There were 16,661 filings representing a 76% increase in the annual filing rate since 1985.

To assist in addressing this expanding caseload and honor the court's commitment to resolve civil matters as justly and quickly as possible, we continue to explore new case processing concepts. In 1992, the court developed specialized calendars to address collections and subrogation cases. This unique calendar will assist in resolving this significant portion of the civil caseload even faster than before with more convenience to the public and the Bar. However, without the expansion of the Multi-Door Division, the impact of this filing rate would have eliminated the ability to use the new case processing structure and resulted in a reversion to former case processing methods producing dramatically higher pending rates and delays.

The Civil Division has also been responsible for processing over 63,000 Landlord & Tenant cases and addressing more than 29,000 Small Claims actions in 1992. To assist in processing its caseload even faster and more justly, the court is attempting to raise jurisdiction in Small Claims cases to \$5,000.

Early intervention by the court and extensive use of alternative dispute resolution techniques has resulted in faster disposition of cases. This program is just beginning to pay dividends and the prospect of cutting back at this critical stage

is disturbing. In the past year, the court has been visited by judicial and administrative representatives from other court systems in the United States and from other countries who have heard of our success and are seeking assistance in emulating it. One county jurisdiction in a neighboring state has been ordered by their chief judge to design a program identical to ours because the local Bar, who also practice in our court, have been pressuring for a similar system in their court. We have spent countless hours with these and other court representatives helping them understand our system and its benefits. It is gratifying to know that our hard work and dedication is benefiting not only our own citizens but also assisting other jurisdictions as well.

MULTI-DOOR DIVISION

The Multi-Door program has expanded from a "settlement week" project that addressed 900 of the oldest civil cases each year to an integrated component of the civil case processing structure. With a settlement rate of over 50% for mediation and neutral case evaluation and 70% in arbitration cases, the success of this program has been greater than even the court expected. With the development of this program, the division now analyzes almost 10,000 cases annually for ADR recommendation and schedules approximately 6,500 cases for ADR hearings. The division actually mediated 4,578 civil action cases which represents a 61% increase from 1991 and 480 domestic relations cases which was a 91% increase. The Multi-Door program also assists in the resolution of

small claims cases. More than any other program, it represents the most efficient method of dispensing justice in our system, yet without appropriate funding, it is in jeopardy.

Our jurisdiction is recognized as having the most innovative and extensive program in the United States offering three different methods of ADR including mediation, neutral case evaluation, and arbitration. In addition, the court is implementing new arbitration rules which will fully use this important dispute resolution technique and assist in providing even greater opportunities for speedier resolution of the civil caseload. The program relies heavily on approximately 600 attorney volunteers who serve as arbitrators, mediators, and case evaluators.

The National Center for State Courts has approached the court to serve as a demonstration and training site in the fall for other jurisdictions to learn of this new case processing and alternative dispute resolution program that is having such a dramatic impact on our caseload. Our new system is so strongly supported in the community that many of the local attorney mediators, recognizing the court's limited resources, but realizing the inherent value of the approach, volunteer their time in service to the community and the court.

Because of the rapid development of the civil delay reduction program, the administrative component has been largely staffed by

fulltime, but "non-funded" employees for which the court is now requesting permanent authorization. The court needs to insure the long term stability of this division and its role in civil case processing by insuring permanent staff support. The court cannot risk being non-responsive to its own rules due to an absence of appropriate staffing in this small, but critically important division. Without the Multi-Door component, there would not be a civil delay reduction effort and the judicial resources required to address all of our caseloads would be much greater.

PROBATE DIVISION

The annual caseload in the Probate Division showed progress. While annual filings remained consistent with 1991 with approximately 3,000 filings in 1992, the overall pending caseload dropped by almost 23% from 6,278 cases to 4,856 cases. The assistance, over the past few years, of the assignment of additional judicial resources and staff, as well as several case processing improvement efforts are producing results in this caseload. I appointed a task force to consider issues relevant to the operations of the Probate Division as well as needed legislative initiatives.

CONCLUSION

In light of the increased activities in all divisions of the trial court and the impact of new legislation, §202 of H.R. 1633 providing for two more judicial positions in fiscal year 1994 and

two in the following fiscal year is fully justified. As a matter of fact, the present crisis warrants that four new judgeships be created immediately in the coming fiscal year.

SECTION 203 - STUDY OF FEASIBILITY OF ESTABLISHING DISTRICT
OF COLUMBIA NIGHT COURT

With respect to Section 203 of Title II calling for a study of the feasibility and desirability of establishing a night court, I suggest that such a study may be unnecessary. We undertook such a review for the Office of the Mayor and for the Judiciary Committee for the District of Columbia Council in connection with one of the recommendations of the Rivlin Commission involving police overtime. I also understand that the District of Columbia Auditor conducted an audit concerning the costs associated with operating a night court, and we made our analysis available to him. A brief summary of our analysis of this issue is included in my statement and may be helpful.

At the outset, it should be noted that presently the Arraignment Court remains in session until 7:00 p.m. or later to complete arraignments/presentments of all lock-ups on a daily basis. Even if we were to accept the assumption, as the Rivlin Commission apparently did, that operation of certain court functions at night would produce some savings in police overtime, a night court cannot be justified as a cost-cutting measure. To begin with, apart from night-papering of charges by the prosecutors, which could be done without night court, operation of the Arraignment

Court and Juvenile New Referrals Court at night will not significantly reduce police overtime. Police are not required to be present at arraignment in adult cases and are required at juvenile new referrals hearings only where a juvenile is detained and a probable cause hearing must be held. Whatever savings of police overtime that may be realized by having the courthouse open could likely be accomplished by some form of extended papering hours without a night court.

In any event, even if night court would produce some small additional savings in police overtime, that benefit will be eclipsed by the added cost associated with the operation of the court at night for arraignments and juvenile new referrals. In short, while a case could be made for a night court based on the liberty interest of the relatively small percentage of late arrestees, who must wait until the next day for arraignment/presentation and possible release on bail, it is surely not a case that can be based purely on a cost benefit analysis. We have made an analysis of the increased costs associated with the operation of the Superior Court at night for arraignments, presentments and juvenile new referrals, and found them to be substantial.

If funds become available, I believe it would be far preferable to establish flex-time for court hearings and trials beginning most courts at 8:30 a.m. running to 3:45 p.m. and five or six courts from 4:00 p.m. to 10:00 p.m. This would provide additional trial time and also alleviate the shortage in courtrooms presently being experienced.

AMENDMENTS TO D.C. CODE §11-1732 - HEARING COMMISSIONERS

I strongly recommend certain limited amendments to D.C. Code 11-1732 embodying the provisions governing the use of hearing commissioners in the Superior Court. First, I believe a brief history of the Office of the Hearing Commissioner would be helpful background.

Office of the Hearing Commissioners - Growth and Development

The hearing commissioner system in the Superior Court of the District of Columbia has evolved over more than 25 years to become an integral part of the Court. From the 1964 appointment of a single hearing officer to hear juvenile cases, the Court has developed an office of fourteen judicial officers who dispose of a great number of cases in the Criminal, Civil and Family Divisions through entry of final orders and judgments. This statement describes the evolution of the hearing commissioner system.

Beginning of the System. In October 1964, the Chief Judge of the District of Columbia Juvenile Court appointed a hearing officer to hear various juvenile matters and uncontested paternity and child support cases. In 1972, after the creation of the Superior Court, a second hearing officer was added to the Family Division to hear uncontested divorce matters. Shortly thereafter, Superior Court General Family Rule D was promulgated, creating the position of hearing commissioner and setting forth the commissioners' authority and duties. Pursuant to this rule commissioners heard evidence and recommended findings of fact, conclusions of law, and

orders which became final when signed by a Superior Court judge. Either party to the action was entitled to a hearing de novo if not satisfied with the hearing commissioner's recommended order.

In May 1980, a third hearing commissioner was appointed to hear mental retardation matters.

Establishment of the Office of Hearing Commissioners. On September 1, 1981, the Office of the Hearing Commissioners was established. This brought together the separate functions of the individual hearing commissioners, expanded their duties, and allowed for greater flexibility and efficiency. Their assignments were rotated so that each hearing commissioner conducted hearings in all classes of cases designated by the Chief Judge to be heard by hearing commissioners. In 1982, a fourth hearing commissioner was appointed.

Temporary Legislation. On September 30, 1982, the United States Congress enacted D.C. Code §11-1732, a temporary provision that authorized the Chief Judge to appoint and remove hearing commissioners and established minimum qualifications. This legislation expanded the duties of commissioners to include criminal arraignments, felony preliminary hearings, nonjury misdemeanor trials, and other contested and uncontested proceedings in the Civil, Criminal, and Family Divisions.

Pursuant to this legislation three commissioners were appointed to hear criminal cases. In 1985, an additional three were appointed to expedite probation revocation proceedings. In 1985, small claims suits were added to the commissioners' duties.

Permanent Legislation. On October 28, 1986, D.C. Code §11-1732 was amended. A comprehensive, permanent, and independent commissioner system similar to the United States magistrate system was put into place. The statute provides that candidates for appointment as hearing commissioners have qualifications similar to those required for individuals seeking to become Superior Court judges. It requires commissioners to abide by the Canons of Judicial Ethics, now known as the Code of Judicial Conduct, and prohibits them from engaging in the practice of law or any activity inconsistent with the expeditious, proper, and impartial performance of their duties. Pursuant to this legislation, commissioners are appointed and may be reappointed for four year terms. Appointments are made by the Chief Judge of the Superior Court, upon the recommendation of the court's Committee on Selection and Tenure of Commissioners (composed of seven judges) and upon the advice of an Advisory Merit Selection Panel, and with the consent of a majority of the Board of Judges of the Superior Court.

Significantly, the 1986 amendment removed consent of the parties as a prerequisite for a commissioner to conduct criminal arraignments, preliminary hearings, probation revocation hearings, and proceedings to determine paternity and to establish, enforce, or modify child support orders. The legislation also authorized the commissioner, with the consent of the parties, to enter findings of fact and final orders or judgments in other contested or uncontested proceedings in the Civil, Criminal, and Family

Divisions of the Court, excluding jury trials and trials of felony cases. This removed the requirement of securing approval by a trial judge for the commissioner's order to constitute a final order of the Superior Court. With the concurrence of the Court of Appeals, the Court has promulgated detailed rules implementing this statute.

In July 1987, four additional commissioners were appointed, bringing the number of commissioners to its current total of fourteen. Shortly, thereafter, I, as Chief Judge, combined all of the commissioners into one unified office and supervised the drafting of formal procedures for the selection and tenure of commissioners. I also appointed the Advisory Merit Selection Panel required by the 1986 legislation to increase community participation in the process of appointing commissioners.

Most recently, upon recommendation of the Chief Judge and the Presiding Judge of the Criminal Division, the Board of Judges expanded the sentencing authority of commissioners to include certain offenses for which the maximum period of incarceration is one year. This action reflects the importance of the commissioners' contribution to coping with the Court's increasing caseload and the confidence of the Board of Judges in the manner in which the commissioners have discharged their responsibilities. In addition, plans are underway to assign commissioners to increased responsibilities in the Civil Division as part of the Court's civil delay reduction effort.

Present Duties of Commissioners. Since the 1986 amendment, commissioners have been assigned, at various times, the following judicial duties (an asterisk denotes matters conducted with the consent of the parties):

Criminal Division

- (a) Determination of conditions of release or detention in all criminal cases.
- (b) Conduct of preventive detention hearings, including cases in which the defendant has been charged with murder in the first degree.
- (c) Conduct of felony preliminary hearings and initial probation revocation hearings in all types of criminal cases.
- (d) Conduct of trials, acceptance of guilty pleas, and pronouncement of sentence in nonjury misdemeanors, e.g., possession of drug paraphernalia, prostitution, petty theft, and cases involving demonstrations, curfew violations, and disorderly conduct.*
- (e) Conduct of trials, acceptance of guilty pleas and pronouncement of sentence in serious traffic offenses, including driving while intoxicated, reckless driving, and driving under the influence of drugs.*

Family Division

- (a) Conduct of proceedings to establish paternity.
- (b) Conduct of proceedings to establish, enforce and modify child support orders.
- (c) Conduct of uncontested domestic relations proceedings including divorce, annulment, child custody, alimony, and property division.*
- (d) Conduct of proceedings concerning the admission, commitment, and review of the commitment of mentally retarded individuals.
- (e) Conduct of juvenile initial hearings, including determination of detention or release and determination of probable cause.*
- (f) Conduct of initial hearings in child abuse and neglect cases, including placement decisions and probable cause determinations.*
- (g) Conduct of hearings to determine whether juvenile offenders should receive first offender treatment (consent decrees).*
- (h) Performance of civil marriage ceremonies.

Civil Division

- (a) Disposition of motions and all other pre-trial and post-trial proceedings in the Small Claims and Conciliation Branch of the Court.*
- (b) Conduct of all trials in the Small Claims and Conciliation Branch of the Court.*

The commissioners are well prepared to continue and expand their service to the community as an integral part of the Superior Court of the District of Columbia. The simple amendments I propose would better enable them to do so.

I believe it would be helpful to assign additional hearing commissioners at this time with limited broader authority in certain areas which would enable us to redeploy some judges currently assigned in those areas. We do not believe that major expansion of their authority is necessary or desirable at this time, nor do we advocate any change that would make their decisions in additional areas appealable without review by a judge. By statute and court rules, the commissioners have been functionally and jurisdictionally integrated into the work of the trial court. We have recently expanded their authority to preside over matters in the Traffic Branch and in the Small Claims Branch.

I should point out that the existing statute would permit commissioners/magistrates to perform all the duties required at this time except as to probate and tax matters with a need for clarifying language with respect to New Referrals (juvenile and neglect family initial hearings), and the establishment of paternity as a basis for child support.

I suggest, therefore, that the needed improvements can be accomplished through a few very limited specific amendments to D.C. Code §11-1732.

In this connection, I have attached to my statement suggested amendments to D.C. Code §11-1732 changing the title of the position of "hearing commissioner" of the Superior Court to "judicial magistrate" and expanding the duties to include the authority to preside over proceedings involving uncontested probate and fiduciary and tax matters and clarifying language with respect to the "new referrals" in juvenile and neglect cases and the establishment of paternity in child support cases. Conforming amendments are offered to D.C. Code §§ 16-2308 and 2312. These are the only areas I am suggesting be included in the broadened authority.

I have included a suggested amendment to D.C. Code §11-1732 in the form of a new subsection (p) which would permit the Joint committee upon the recommendation of the Executive Officer to set the salary of judicial magistrates. Conforming amendments to D.C. Code §11-1726, §11-2102(c) and §21-502(e) would be required as indicated to delete references to the federal grade rates some of which are no longer in existence.

A "grandfather clause" is added as subsection (q) and appropriate changes are made in subsection (c)(3). Most of subsection (m) is eliminated. The report required by this subsection was forwarded to the Congress in early 1988.

H.R. 1631 - A BILL TO AMEND SMALL CLAIMS BRANCH JURISDICTION

In connection with our new Civil Delay Reduction Program and the use of commissioners to hear small claims cases with consent of the parties, the Board of Judges has approved an increase in the jurisdiction of the Small Claims Branch from \$2,000 to \$5,000. Increasing the Superior Court's small claims jurisdiction from \$2,000 to \$5,000 will permit 36% of our civil action cases to be heard in the Small Claims Branch. The majority of these would be collection cases. This will allow these cases to proceed on a fast track utilizing informal procedures. The jurisdictional amendments last changed in 1984. Accordingly, I support and urge enactment of §403 which is identical with §2 of H.R. 4096.

DRAFT LEGISLATION

§11-1732. Hearing Commissioners Judicial Magistrates.

(a) With the approval of a majority of the judges of the Superior Court of the district of Columbia in active service and subject to standards and procedures established by the rules of the Superior Court, the chief judge of the Superior Court may appoint ~~hearing commissioners~~ judicial magistrates, who shall serve in the Superior Court and perform the duties enumerated in subsection (j) of this section and such other functions incidental to these duties as are consistent with the Rules of the Superior Court and the Constitution and laws of the United States and of the District of Columbia.

(b) ~~Hearing commissioners~~ Judicial magistrates shall be selected pursuant to standards and procedures adopted by the Board of Judges. Such procedures shall contain provisions for public notice of all vacancies in ~~hearing commissioners~~ judicial magistrates positions and for the establishment by the Court of an advisory merit selection panel, composed of lawyer and nonlawyer residents of the District of Columbia who are not employees of the District of Columbia Courts, to assist the Board of Judges in identifying and recommending persons who are best qualified to fill such positions.

(c) No individual shall be appointed as a ~~hearing commissioner~~ judicial magistrate unless that individual --

- (1) is a citizen of the United States;
- (2) is an active member of the unified District of Columbia Bar and has been engaged in the active practice of law in the District for five years immediately preceding the appointment or for such five years has been on the faculty of a law school in the District, or has been employed as a lawyer by the United States or District government; and
- (3) is a bona fide resident of the District of Columbia and has maintained an actual place of abode in the District for at least ninety days immediately prior to appointment, and retains such residency during service as a ~~hearing commissioner~~ judicial magistrate, ~~except that hearing commissioners appointed prior to the effective date of this section shall not be required to be residents of the District to be eligible to be appointed to one of the initial terms under this section or to be reappointed, except that any individual appointed prior to October 28, 1986, to the position of hearing commissioner shall not be required to be a resident of the District to be eligible to serve as a judicial magistrate or to be reappointed to that position.~~

~~(d) Hearing commissioners shall be appointed for terms of four years and may be reappointed for terms of four years. Those individuals serving as hearing commissioners on the effective date of this Act shall be automatically appointed for a four-year term.~~

(d) Judicial magistrates shall be appointed for terms of four years and may be reappointed for terms of four years in accordance with standards and procedures established by the Superior Court.

(e) Upon the expiration of a hearing commissioner's judicial magistrate's term, the hearing commissioner judicial magistrate may continue to perform the duties of office until a successor is appointed, or for 90 days after the date of the expiration of the hearing commissioner's judicial magistrate's term, whichever is earlier.

(f) No individual may serve as a hearing commissioner judicial magistrate under this section after having attained the age of seventy-four.

(g) The Board of Judges may suspend, involuntarily retire, or remove a hearing commissioner judicial magistrate, during the term for which the hearing commissioner judicial magistrate is appointed, only for incompetence, misconduct, neglect of duty, or physical or mental disability. Suspension, involuntary retirement, or removal requires the concurrence of a majority of judges in active service. Before any order of suspension, involuntary retirement, or removal shall be entered, a full specification of the charges and the opportunity to be heard shall be furnished to the hearing commissioner judicial magistrate pursuant to procedures established by rules of the Superior Court. .

(h) If the Board of Judges determines that a hearing commissioner judicial magistrate position is not needed, the Board of Judges may terminate the position.

(i) (1) Hearing commissioners Judicial magistrates may not engage in the practice of law, or in any other business, occupation, or employment inconsistent with the expeditious, proper, and impartial performance of their duties as officers of the court.

(2) Hearing commissioners Judicial magistrates shall abide by the Canons of Judicial Ethics as adopted by the Joint Committee.

(j) A hearing commissioner judicial magistrate, when specifically designated by the chief judge of the Superior Court, and subject to the rules of the Superior Court and the right of review under subsection (k), may perform the following functions:

(1) Administer oaths and affirmations and take acknowledgements;

(2) Determine conditions of release pursuant to the provisions of title 23 of the District of Columbia Code (relating to criminal procedure);

(3) Conduct preliminary examinations and initial probation revocation hearings in all criminal cases to determine if there is probable cause to believe that an offense has been committed and that the accused committed it;

(4)(A) In any case brought under §11-1101 (1), (3), (10), or (11) of the District of Columbia Code involving the establishment of paternity or the establishment or enforcement of child support, or in any case seeking to modify an existing child support order, when a hearing commissioner judicial magistrate in the Family Division of the Superior Court finds that there is an existing

duty of support, the ~~hearing-commissioner~~ judicial magistrate shall conduct a hearing on support, make finding, and enter judgment as provided by law, and in accordance with guidelines established by rule of the Superior Court, which judgment shall constitute a final order of the Superior Court. child support guidelines established by the City Council of the District of Columbia, which judgment shall constitute a final order of the Superior Court.

(B) If in a case under paragraphs [paragraph] (A), the ~~hearing-commissioner~~ judicial magistrate finds that a duty of support exists and makes a finding that the case involves complex issues requiring judicial resolution, the ~~hearing commissioner~~ judicial magistrate shall establish a temporary support obligation and refer unresolved issues to a judge of the Superior Court

(C) In cases under subparagraphs (A) and (B) in which the ~~hearing-commissioner~~ judicial magistrate finds that there is a duty of support and the individual owing that duty has been served or given notice of the proceeding under any applicable statute or court rule, if that individual fails to appear or otherwise respond, the ~~hearing-commissioner~~ judicial magistrate shall enter a default order, which shall constitute a final order of the Superior Court;

(5) Conduct juvenile initial and detention hearings and neglect initial and shelter care hearings.

(6) Conduct proceedings and issue orders in uncontested probate and fiduciary matters.

(5) (7) Subject to the rules of the Superior Court and with the consent of the parties involved, make findings and enter final orders or judgments in other uncontested or contested proceedings, in the Civil, Criminal, and Family, Probate, and Tax Divisions of the Superior Court, excluding jury trials of felony cases.

(k) With respect to proceedings and hearings under paragraphs (2), (3), (4), and (5), (6), and (7) of subsection (j), a review of the ~~hearing-commissioner's~~ judicial magistrate's order of judgment, in whole or in part, may be made by a judge of the appropriate division sua sponte and must be made upon a motion of one of the parties made pursuant to procedures established by rules of the Superior Court. The reviewing judge shall conduct such proceedings as required by the rules of the Superior Court. An appeal to the District of Columbia Court of appeals may be made only after a judge of the Superior Court has reviewed the order or judgment.

(l) The Superior Court shall ensure that all ~~hearing-commissioners~~ judicial magistrates receive training to enable them to fulfill their responsibilities.

~~(m) (1) the chief judge of the Superior court, in consultation with the District of Columbia Bar, the City Council of the District of Columbia, and other interested parties, shall within one year of the effective date of this section, make a careful study of conditions in the Superior court to determine—~~

~~(A) the number of appointments required to provide for effective administration of justice;~~

~~(B) the division in which hearing commissioners shall serve;~~

~~(C) the appropriate functions of hearing commissioners; and~~

~~(D) the compensation of, and other personnel matters pertaining to, hearing commissioners.~~

Upon completion of the study, the chief judge shall report the findings of such study to the appropriate committees of the Congress.

~~(2) After the study required by paragraph (1), the chief judge shall, from time to time, make such studies as the Board of Judges shall deem expedient, giving consideration to suggestions of the District of Columbia Bar and other interested parties.~~

(m) The chief Judge of the Superior /court shall, from time to time, make such studies on the utilization of judicial magistrates as the Board of Judges shall deem expedient, giving consideration to suggestions of the District of Columbia Bar and other interested parties.

(n) With the concurrence of the District of Columbia Court of Appeals, the Board of Judges of the Superior Court may promulgate rules, not inconsistent with the terms of this section, which are necessary for the fair and effective utilization of hearing commissioners judicial magistrates in the Superior Court.

(o) For purposes of this section, the term "Board of Judges" means the judges of the Superior court of the District of Columbia. Any action of the Board of Judges shall require a majority vote of the sitting judges.

(p) The Joint Committee shall fix the rate of compensation of judicial magistrates in accordance with section 11-1726.

(q) Any individual currently serving as a hearing commissioner shall become a judicial magistrate, subject to the provisions in subsections (f), (g), and (h) of this section, for the remainder of the terms of that individual's current appointment.

§ 16-2308. Initial appearance.

The initial appearance, before a judge judicial officer assigned to the Division, of a child named in a delinquency or need of supervision petition or of the parent, guardian, or custodian of a child named in a neglect petition shall be at the time set forth in the summons, which shall be not later than five days after the petition has been filed. At the initial appearance, the child and his parent, guardian, or custodian shall be advised of the contents of the petition and of the right to counsel as provided in section 16-2304. At the initial appearance the child, or in neglect cases the parent, guardian, or custodian, may admit or deny the allegations in the petition, but it shall not be necessary at the initial appearance for the Corporation Counsel to establish probable cause to believe that the allegations in the petition are true. At the initial appearance, the judge judicial officer may set the time for the fact-finding hearing or continue the matter until a later time. Failure to hold the initial appearance at the time specified shall not be grounds for dismissal of the petition. This section shall not apply in any case where, prior to or at the time of the initial appearance, a detention or shelter care hearing is required by section 16-2312.

§ 16-2312. Detention or shelter care hearing; intermediate disposition.

(c) At the commencement of the hearing the judge judicial officer shall advise the parties of the right to counsel, as provided in section 16-2304, and shall appoint counsel if required. He The judicial officer shall also inform them of the contents of the petition and shall afford the child, or in a neglect case, the parent, guardian, or custodian, an opportunity to admit or deny the allegations in the petition. He The judicial officer shall then hear from the Corporation Counsel to determine whether the child should be placed or continued in detention or shelter care under the criteria in section 16-2310. The child and his parent, guardian, or custodian shall have a right to be heard in their own behalf.

(d) (1) At the conclusion of the hearing, the judge judicial officer shall --

(A) order detention or shelter care, setting forth in writing his/her reasons therefor, if he/she finds that the child's detention or shelter care is required under the criteria in section 16-2310; or

(B) order the child released if he/she finds that the child's detention or shelter care is not required under such criteria.

(2) If a child is ordered released under paragraph (1) (B) of this subsection, the judge judicial officer may impose one or more of the following conditions:

(A) Placement of the child in the custody of a parent, guardian, or custodian or under supervision of a person or organization agreeing to supervise him/her.

(B) Placement or restrictions on the child's travel, activities, or place of abode during the period of release.

(C) Any other condition reasonably necessary to assure the appearance of the child at a factfinding hearing or his/her protection from harm, including a requirement that the child return to the physical custody of the parent, guardian, or custodian after specified hours.

(e) When a judge judicial officer finds that a child's detention or shelter care is required under the criteria of section 16-2310, he/she shall then hear evidence presented by the Corporation Counsel to determine whether there is probable cause to believe the allegations in the petition are true. The child, his parent, guardian or custodian may present evidence on the issues and be heard in their own behalf.

(f) When a judge judicial officer finds there is probable cause to believe the allegations in the petition are true, he/she shall order the child to be placed or continued in detention or shelter care and set forth his/her reasons. When a judge judicial

officer finds that there is not probable cause to believe the allegations in the petition are true, he/she shall order the child to be released.

(g) The Division at a detention or shelter care hearing may not postpone the determination of whether detention or shelter care is required. For good cause shown, however, the Division may grant a continuance of any other part of the hearing (including the filing of a petition) for a period not to exceed five days.

(h) On motion by or on behalf of the child, a child in custody shall be released from custody if his/her detention or shelter care hearing is not commenced within the time set herein.

(i) If a child is not released after his/her detention or shelter care hearing and the parent, guardian or custodian did not receive notice thereof, the Division may, in the interest of justice, conduct a new hearing in accordance with rules prescribed by the Superior Court.

(j) Upon objection of the child or his/her parent, guardian or custodian, a judge judicial officer who conducted a detention or shelter care hearing shall not conduct a factfinding hearing on the petition.

§11-1726. Compensation.

In the case of nonjudicial employees of the District of Columbia courts whose compensation is not otherwise fixed by this title, the ~~Executive Officer Joint Committee upon the recommendation of the Executive Officer~~ shall fix the rates of compensation of such employees. ~~without regard to chapter 51 and subchapter III of chapter 53 of title 5, United States Code, and such rates shall not exceed the maximum rate prescribed for GS-15 of the General Schedule, except that the Executive Officer may fix the rates of compensation of~~

~~(1) — 5 positions at not to exceed the maximum rate prescribed for GS-16 of the General Schedule, and~~

~~(2) — 2 positions at not to exceed the maximum rate prescribed for GS-17.~~

In fixing the rates of nonjudicial employees under this section, the ~~Executive Officer Joint Committee~~ shall be guided by the rates of compensation fixed for other employees in the executive and judicial branches of the Federal and District of Columbia governments occupying the same or similar positions or occupying positions of similar responsibility, duty, and difficulty.

§11-2102. Appointment; oath; bond; qualifications; compensation.

(a) - (b) [Unchanged]

(c) The compensation of the Register of Wills shall be fixed by the ~~Superior Court without regard to chapter 51 and subchapter III of chapter 53 of title 5 of the United States Code but at a rate not to exceed the maximum rate prescribed for GS 16 of the General Schedule~~ Joint Committee in accordance with section 11-1726.

§21-502. Commission on Mental Health; composition; appointment and terms of members; organizations; chairman; salaries.

(a) - (d) [Unchanged]

(e) The salaries of the members of the Commission and its employees shall be fixed by the Joint Committee in accordance with ~~the provisions of the Classification Act of 1949, as amended~~ section 11-1726. The alternate Chairman shall be paid on a per diem basis at the same rate of compensation as fixed for the permanent Chairman.

Ms. NORTON. Thank you very much, Judge Ugast.

Before I ask each of you just a few questions, I would like, on the public record, to compliment you both. Instead of coming to this committee to seek efficiency through expansion, what you have both done is to effect efficiencies which you have documented in great detail with what you have.

Increasingly, the Congress wants to see what you have done before we take steps. I must tell you very seldom do we see efficiencies done before we get requests for expanded staff or some kind of expanded structure.

Federal Courts

Just so everybody will understand where I am coming from, I sat in a subcommittee meeting yesterday to hear from the representative of the Federal courts who came in asking for three quarters of the Federal district's budget to construct new courthouses.

Well, most of the members of the committee are not lawyers and are used to hearing people say just give me more money and more space. Heaven knows the Congress has given the Federal courts expanded new jurisdiction at a rate that would blow you over. But the fact is that on cross-examination, the representative of the Federal courts were unable to tell me a single thing they had done to try to keep up with this expanded jurisdiction other than through expanded space for bricks and mortar.

So, what we have all over the United States are these grand and glorious courthouses going up, and he simply was unable to document what he had done first. I just said on the record that I was not prepared to vote reflectively for courthouses.

There were other needs of the Federal Government, some of them bricks and mortar, other than courthouses. So I bring the same approach as I look at your request. I have looked in detail at your request and in detail at what you have done. As a person who herself, when I chaired the EEOC, eliminated layers—I don't like the idea of layers. I have studied what you have done up until now. I just want to say on the record that this is a model for how to get as much out of an existing system as you can and then come before the authorizers and the legislators and say, Now, are you willing to do your part?

Just on the record, let me say that an example of that is what you want done with the magistrate and with the court of claims. We can get more out of the formal judicial system if these parts of the system are given more responsibility. So you have supported that, and it is clear that will bring greater efficiency and will save time and money for all concerned.

I want to say what the record will not show, because the record probably will not have these graphs. The graphs are very dramatic evidence that all the efficiencies in the world cannot make up for a structural deficiency because, despite the documented efficiencies, the graphs show really quite appalling growth. I would like to ask a few questions that make us understand that growth and what can be—what should, in fact, be done about it.

Backlog—Appeals

First, let me ask Judge Rogers, why do we see this great increase? We know what we do about superior court, that is using ADR far more aggressively than most courts. I strongly endorse the use of ADR, alternative dispute resolution, instead of taking everything through the most expensive part of the system. They have done that.

You say that their own efficiencies have not reduced the appeals. One would think if people settled their matter there is one less case to even consider for appeal. Why is there not more conformity between those two sets of figures?

Judge ROGERS. What has happened in the trial court of course is that the Congress has doubled the size of the trial court. The number of judges have gone from 36 to 59; the number of hearing commissioners have gone from 1 to 15.

All kinds of studies that have been done show that when you add judges, it enables the court to proceed and do more cases.

What is happening in the civil delay reduction is the cases are just coming to the court of appeals faster. They are not disappearing.

Alternative dispute resolution, mediation and arbitration, all of which the trial court is doing, means that by the time the cases come to the appellate courts, the parties are no longer interested in mediation settlement, et cetera. They have been through that process already. So the efforts we tried in the past with settlement conferences, with other sorts of efforts to resolve issues on appeal, the parties are no longer amenable to that alternative despite the fact—

Ms. NORTON. The number of cases settled ought to affect the number of appeals.

Judge ROGERS. The problem is all of this is coming at the end of a major expansion of the trial court. From 1971, when Congress had 36 judges and then 44 judges and then increased it another 7 judges and the number of 8 judges in the trial court, all of that is producing cases for the court of appeals and the problem is while the bottom of the pyramid has continued to expand in terms of the number of judges, the same funnel exists for the resolution of those appeals.

Case Load

Now, what Judge Ugast has described in terms of the problems of new legislation, remember during this same two-decade period we had the creation of a local government that has been very active in the legislative area. So, in addition to the congressional legislation that applies not only to the States but to the District of Columbia, you have legislative activity at the council level, which creates new rights and remedies as well as new administrative proceedings, all of this is still coming to an appellate court that was designed several decades ago when a very different circumstance existed.

The type of growth in litigation that has occurred in this country in the last two decades was not anticipated. That is why the States have had to respond the way they have. They have simply found

that once you reach about the level of 1,000 appeals, you cannot keep the process moving quickly and provide for the appellate court to do its law determining function.

That is the situation we face in the District of Columbia. The trial court is continuing to be very efficient now in terms of trying to divert cases. But it is not able to do away with the cases which it is saying require still more judges for the trial court. This bill would provide an additional four judges in the trial court.

While the hearing commissioner provisions that Judge Ugast has provided the committee with, would have a system whereby you could not appeal the hearing commissioner's decision without first going through a trial judge, those cases will ultimately also come, as they do now, to the court of appeals.

So we have been successful in weeding out some of the simple cases and weeding out some cases that are suitable for resolution without going through a trial in the trial court. But there is still a vast number of cases that are coming up to the court of appeals and will continue to come up to the court of appeals.

Ms. NORTON. Would you summarize, finally, Judge Rogers, just quickly, the kind of actions you have taken to increase the efficiency of the court with its present number of judges?

Case Management

Judge ROGERS. We have always had nine judges on our court, and as you can see from the charts, the number of filings has continued to increase over the years. So have the number of dispositions because we have done a number of things in the court of appeals and we have emphasized them in particular when we came to the Congress in 1989 and said we wanted to create this Case Management Program.

What we have done is we have modified our rules, we have changed our policies so that the time that people have to act within the court of appeals has been decreased. We have increased our motions calendar so that we encourage appeals to be resolved on motions without going through the full process of having three judges hear it, with an oral, formal oral argument, and published opinion.

We have also increased our summary calendar, that is the very simple cases in order to keep as many cases moving as fast as possible. We created a second summary calendar so that those cases would move very quickly through the system.

We have also expanded the use of our senior judges. People said, Why don't you add judges to the court of appeals? Well, we have seven senior judges so we have used them more.

That is the type of thing that we have done to make the most efficient use of the system we have. The basic problem, however, is that you have nine active judges who are there full time. You have seven senior judges who are there part time, and trying to blend them in so that you have a three-judge panel that is available to hear these cases means that you have a limited number of three-judge panels available to hear cases.

There is so much efficiency that you can do but then it ultimately comes down to having judges available to decide the cases.

So the results of the case management system have been to move cases very quickly once they are filed so that they can be decided. As I mentioned, we have the advanced calendar system which show that we can move cases very quickly from the point of docketing to the point of filing an appeal to the point of setting the case for oral argument.

The problem is the cases started to stack up and become stale so we had to abandon that. So, all of these efficiencies in moving the cases so they can be decided by judges, we have demonstrated those can be done. The problem is we need a system so you can keep the cases moving quickly but you can also have a court system that can address these questions of District law which are not being decided now.

The court is overburdened to the point that the courts are reluctant to get into these difficult questions and we will try to circumvent them as best we can. The problem is it permeates the litigation, doesn't provide guidance for immediate parties, doesn't provide guidance for the trial court or for the hearing commissioners. It means our court has three-judge panel decisions in conflict with one another that are simply not being resolved.

Ms. NORTON. Thank you very much, Judge Rogers.

Finally, it looks as though, in effect, you are asking us to correct something the Congress has already done which rendered an unintended consequence. There was a 3-tier system and Congress abolished the 3-tier system leaving a 2-tier system. Could you explain, if you know, what was responsible for the original decision to have two rather than three tiers?

Backlog—Appeals

Judge ROGERS. The best I can determine is that at the time the local jurisdiction was being transferred from the Federal courts it was simply not anticipated that this volume of appellate litigation would occur. When you look at the past history of the District of Columbia, when you look at other jurisdictions, any jurisdiction with this level of appellate volume has some sort of intermediate appellate court structure.

The best I can anticipate and the studies that show that the increase in litigation over the past two decades was simply not anticipated.

Ms. NORTON. Finally, could I ask you to respond to a statement made by appeal court judge, John W. Kern III: "It is my considered conclusion that the cost of the proposed supreme court will result in more delay for the city's litigants and more expenditures by the city on items less than crucial to the city's well-being outweighs the benefit accruing to the judges of lessening their work load in order to allow them more time to write their decisions.

Could you comment on that for the record?

Judge ROGERS. Well, I know it has been stated that the justice system is working well. My question is working well for whom?

Backlog—Appeals

If it is working well for the litigant who is trying to resolve a dispute, whether it be in the normal tort area, involving business-

men, landlord and tenants, involving domestic relations, custody disputes, indeed you know the Congress itself became so concerned about what was happening in a single custody case that it passed legislation to require the courts to expedite that custody case in the courts.

Now, that is happening to many custody cases, adoption cases, divorce cases, property settlement cases, and, of course, it is also happening in the administrative area, people who are unemployed trying to get benefits, employers trying to get these issues resolved so they don't have to pay unemployment compensation; workers' compensation. You also have major businesses in this community which are urging the court to schedule their cases because time is money. You have small businessmen and women in this community who say that to delay on appeal is adversely affecting their ability to carry on their business.

I get letters from individual litigants who can't understand why their cases can't be decided, and, of course, there is this tremendous volume of criminal cases.

Now, the system is set up now so that there can be appeals during the time a prosecution is pending; that is, the United States as the prosecutor can bring an interlocutory appeal to the court of appeals. Those must be expedited. The types of pretrial detention cases which Judge Ugast was mentioning, those must be expedited when they are on appeal, any time they are on the court of appeals. Any time there is an appeal involving a juvenile case, those must be expedited. Any time there is an appeal involving a public utility, those must be expedited. Cases involving certified questions from the trial court, those must be expedited.

The question is who is being served by all this? We are trying to do our best to respond to the need to expedite cases where we have some discretion about the matter. As a matter of policy, the court expedites all custody cases, adoption cases, but nevertheless there is delay.

We necessarily must comply with the statutes which require us to expedite cases.

But surely the District of Columbia, as I said, it is not only the residents of the District, it is the people who work here, the people who have businesses here, and the people who visit the Nation's Capitol, have a right, it seems to me, just as in any other jurisdiction, to be assured that we have a court system where these disputes can be resolved in a reasonably timely manner and in a fair and just manner where there is a mechanism available that can resolve conflicts, disputes and uncertainties.

That is all we are asking for.

It seems to me, as I mentioned in my statement, that the type of expenditure here is a drop in the bucket compared to the type of expenditures that this Congress has to face, much less the District government has to face. The entire court system is less than 3 percent of the D.C. government's operating budget. So, while the numbers are in the millions, we are talking about a very small percentage.

Furthermore, this Congress over the last 20 years has provided for the trial court over \$30 million worth of additional support.

Now, you cannot have a situation where that type of major financial support is put in one part of the system, and not also address the other part of the system, which is a very small financial commitment by comparison. All we are talking about—we are not talking about programs, we are simply talking about those judges you mentioned, a secretary, their law clerks, and about a dozen more people in the clerk's office. Indeed, this bill provides for a single clerk's office as a way of providing for more efficient, less expensive administrative support for two court systems.

So, I think we have tried to pare the court system down to keep expenditures down. But on the other hand, I think it is an expenditure that is part of one of our branches of government and is critical to the continued peace and harmony in this community.

What the Mayor was talking about yesterday is it is time to heal this community. We have to have the courts able to respond and have the community feel that they can have confidence in the courts, because they are going to resolve issues in a timely manner and in a fair and impartial manner.

Ms. NORTON. Thank you very much, Judge Rogers.

Judge Ugast, the Congress has been somewhat more open to your needs. If it hadn't, by now you would be totally buried under cases, and I would have to come with a shovel to get you out in order to testify here this morning and yet you are left in an unenviable situation. As we have seen, the case load continues to grow at the superior court level in this city.

It should also be noted for the record that the average citizen, indeed I think the average Member of Congress, if you look at the way we have dealt with crime, for example, regards the criminal justice or indeed the justice system as a system that consists essentially of the cops. Once you arrest somebody, you have entered the system. Unless you are prepared to move expeditiously through that system, if anything, their work can get nullified.

This whole system has to operate smoothly with one fitting the other, going right a long or else the parts that have preceded it are essentially undermined. We now see this happening in the warehousing approach, for example, of criminals. We want them off our streets badly and now all over the country we are having to let them out because we pile everything up to the back end and are totally unintelligent in dealing with the front end. It looks like we have been unintelligent in dealing with the court system as well. We have indeed because we almost could not avoid it, added some judges, less than we should have at the superior court station, and then the next station has been left with your increases and no relief. I just wanted to indicate for the record you do support the supreme court idea?

Judge UGAST. Yes, I do.

Hearing Examiners

Ms. NORTON. Let me ask you about the magistrate notion. You would now have the hearing commissioner become a magistrate and give some limited jurisdiction there. This idea of the magistrate has gone back and forth so I would like to understand precisely its importance and your recommendation at this time.

Ms. NORTON. What is the difference in what we have had in prior bills regarding the hearing commissioners or magistrates and what you are calling for in your April 19 letter and in your remarks today?

Judge UGAST. I believe what I have suggested is more limited. Some of the earlier versions sought to expand a good deal further the areas in which the commissioners and magistrates would have responsibility and it is my feeling that we have tried as this has developed gradually to see that the commissioner-magistrate office be functionally integrated with the responsibilities of the judges throughout the whole trial court setup.

So, what we have tried to do is to look at the various areas of responsibility and utilize and ask the commissioners-magistrates to handle and help in those areas that one would free up judges for areas that had to be handled by judges and could not be handled by judicial officers, not judges.

So, in each of these areas that we have done, we have expanded some. The statute, except for the area of probate and tax, the statute already permits the court to utilize commissioners with consent of the parties except in probate and tax. It was never included in the general section of what responsibility the magistrates could work. That whole probate area and the guardianship and conservatorship legislation which came later, around 1987 or 1988, has mushroomed.

What we are suggesting here is that a commissioner could assist the probate judge. We have one judge sitting as the probate fiduciary judge and another judge part time. There are so many voluminous matters that could be handled by judicial officers, not a judge, as it is done in many jurisdictions. But that is one of the areas that we think would assist very much in freeing up a judge for areas, for example, the jury criminal trials are all handled by judges.

It is that kind of thing. We have expanded them into small claims. We have expanded them into the traffic area and now in the collection-type cases and small claims areas where the volume is high and yet their perception by the people and the citizens, which we think is important, that a judge or judicial officer is hearing their matters, with consent in those kinds of things, can best help the court meet its responsibility.

So it is more limited—for example, I believe one of the provisions in one of the bills gave the commissioners-magistrates authority to try cases up to \$25,000 and I think maybe some had the provision about a jury trial.

We have not asked for that kind of authority at this time.

This is something that continues to develop and whether the criminal is going to level off, which we hope it is, we have grants doing new things with the drug project dealing with felony drug cases, all of those things we are trying to do and utilize the magistrates in each division is what we are really doing, but not as quite as expanded as was put in the other bill.

Many of the things that were actually set out in the other legislation left authority to do so under the rules of the court or if the court amends their rules to permit them to do so. The legislation is broad enough.

Ms. NORTON. I certainly welcome the use of added authority here. As you see by the small claims bill, which is noncontroversial in this Congress, it is easier to add authority and we want to encourage you to do what you have done already before coming to us with the supreme court proposal; that is, use all the authority you can. If you think these magistrates need more authority, at some point I would welcome that, if it would relieve the superior court or court of appeals.

Night Court

One final question, you mentioned night court and there is a lot of talk about night court and a lot of disappointment in the city that it has not occurred. Again looking first to existing authority, you suggested the flex time in assignment of judges and papering might in fact accomplish the same purpose. Does that mean you think you can do that now under present authority?

Judge UGAST. With sufficient funding. We have tried to cost it out. We know a night court in terms of arraignment would be substantially expensive. The flex time I think would reduce the cost we would have to utilize. People get premium time for working after certain hours. What we are trying to do is cost out what it would require within our present appropriations to see what we could do.

The extended papering hours is a matter I suggested to the new chief of police and will suggest further to the prosecutorial office as to whether that doesn't deserve another look which would also help, I would think, the police overtime the next day.

Some of that got complicated by the fact that many of the cases, the drug cases, are indicted within the next day or second day thereafter requiring the officers to come back to court anyway so the cost efficiency was an issue that I think the police and the prosecutors needed to look at. But I and the court have encouraged them to do that.

As far as certain type of things at night, I don't think it is too realistic, certainly not bringing jurors and it is hard to get witnesses to come down at night. But there are certain courts we could run that would be a convenience and would also permit us to have a little further room to move and space wise and with additional hours for the courts.

I think we can do those things within our present rules and statute. The question is to be sure that we have the funding to do what would be required.

Ms. NORTON. Judge Ugast, let me encourage you to seek the appropriate funding necessary. I was talking to the city about a night court. There might be a willingness to save funds by putting this nonstructural change into place. I would very much like to see some pursuit of that.

There is a new Chair of the D.C. Judiciary Committee and the council might be open to that kind of small expense which might save money ultimately.

I want to thank both of you for very substantial testimony. The ranking member and other minority members and other members of the majority may have questions for you. We will leave the

record open to receive any such questions and would ask you to respond promptly to any such questions.

Ms. NORTON. I understand your charts are indeed in the back of your testimony, Judge Rogers. So, they will be available when our record is complete.

Again, thank you very much for this very helpful testimony.

May I welcome the next two witnesses: Hon. John W. Kern, senior judge, D.C. Court of Appeals; and Alan I. Herman, Esquire, former clerk of the court of appeals.

I want to thank you both for coming down. First we will hear from Judge Kern.

STATEMENT OF HON. JOHN W. KERN III, SENIOR JUDGE, D.C. COURT OF APPEALS

Judge KERN. Madam Chairperson, I appreciate very much the opportunity to be here. This is the third time that this committee has heard from me and sometimes I wonder whether Chief Judge Rogers and I shouldn't replicate the Lincoln-Douglas debate. I guess I would choose Lincoln because I am taller.

But in any event, if I were convinced that this court, of which I have been a member for 25 years, and this community, which I have been a resident for 40 years, were better served by the creation of yet another appellate court, I would of course favor it.

Obviously, justice delayed is justice denied. I want to just read for you a part of one page of my statement which is a part of the record.

Backlog—Appeals

We must acknowledge that there is continuing criticism of the present D.C. Court of Appeals for the length of time it takes to decide the some 800 appeals presented for its decision each year.

The standards for reduction of appellate delay promulgated by the American Bar Association are not now being met by the D.C. Court of Appeals in its decisionmaking as shown below. Then I set forth in chart form the familiar four stages of appeal and I list the ABA standard and the performance of the D.C. Court of Appeals in 1992 and its performance in 1987.

I think those figures speak for themselves that in those four stages of appeal the court was not in 1987, and was not in 1992 meeting the standards. The most glaring failures were in the two areas that judges have the least impact. In fact, they have no impact at all, namely, the preparation of the record which, I think I demonstrated the last time I was before this committee, is simply reproducing copies of the papers filed in the trial court.

In the filing of the briefs it is—this is just a sample of the briefs that are filed in the 800 appeals that finally come to our court for decision.

I go on to say—and this is the construction of my testimony, and again I emphasize that we should be doing everything possible to reduce delay because a prompt and fair disposition of appeals is obviously essential to the well-being of our citizens.

I say, however, H.R. 1633 does nothing to remedy this delay in the D.C. Court of Appeals. Indeed H.R. 1633 would worsen the

delay in two respects, first the bill removes the judges from the D.C. Court of Appeals and places them on the proposed supreme court, replacing them with nine brand-new judges largely unfamiliar with the appellate adjudicatory process.

Second, it adds to the time consumed by the appellate process filing an additional record and another brief in the new supreme court.

It seems to me that the issue that has divided us consistently is how best to deal with a flow of cases for decision that really boil down to about 300 decisions that we issue each year which are precedent setting. They are reported in West Atlantic Reporter and they guide the District of Columbia lawyers and trial court and citizens in the operation of their business and lives.

I would simply point out that we could create two more appellate courts and we would have no impact upon bringing the record from the trial court to the appellate court and in bringing the briefs in from the parties.

I have never been persuaded that the court is facing a tidal wave of appeals. One need only look at the D.C. Court of Appeals' annual report and note that in 1985 there were 1,796 appeals filed; in 1992 there were 1,643.

I would note that in this year, as of the end of March, there have been 388 filings and there have been 435 dispositions.

My point is not to minimize the challenge facing the court. It is not to be insensitive to the most important objective of our court, which is to provide fair and prompt decision of appeals.

My point is simply to point out that the creation of another entire court, with nine more judges adding another stage of the appellate process to the movement of cases, is in my judgment not a way to succeed in the goal that we all share, which is to attempt to obtain prompt and fair disposition of appeals.

Budget Cuts

It does seem to me that this committee has to make the judgment about whether it is sound public policy, particularly in this time of reduction of budgets and cutting back on government personnel, to create an entire new court with nine judges, each judge having a secretary and a law clerk, at certainly a significant expense, at a very time when the president of the District of Columbia Bar and the president-elect of the District of Columbia Bar wrote an open letter to the Washington Post, and I have it in front of me and would be glad to submit it for the record. It is dated, Monday, March 22. It is by Jamie Gorelick and Mark Tuohey. I will just read a part of it to give you a drift of this letter. You probably saw it yourself.

It starts out saying:

Our local courts, the safety valve of our community, are threatened because of inadequate funding.

It goes on to state:

The Mayor has recommended that the judicial branch of the District of Columbia government absorb a budget cut of more than 6 percent of its 1993 operating budget when that branch, after years of receiving funding well below its needs, has requested an increase of roughly 7.6 percent. This kind of budget cut has been called a crisis point by the American Bar Association. We, too, think that it reflects a crisis.

Then reading their conclusion, sorry, paragraph:

When the court's funding falls below a minimum level, all of us are affected. The foundation of our government weakens, we become more susceptible to unrest and disorder. This vulnerability may be hard to calculate with precision but it is too profound to ignore.

It raises for me this issue and I am sure it is an issue to members of this committee, do we want to make additional to—to obtain additional Federal funding to replace—to assist, rather, to make up for the cutting that the Mayor and the council are necessarily going through or do we want to divert that Federal funding to another appellate court atop the present two courts.

I respectfully suggest that if Federal funding which H.R. 1633 provides is to be most efficiently used for the benefit of all residents of the District of Columbia, that it should be seeking to make up for the cuts that the two presidents of the bar have pointed out, rather than to create a brand new court.

The other point I would have to make is a psychological one. We are asking the residents of the District of Columbia and the employees of the District of Columbia government to tighten their belt, in some cases to leave their jobs. In some cases to—in all cases, to do more with less.

At the very same time, H.R. 1633 calls for an expansion of the bill, an addition of moneys to create another court composed of nine judges, each with a secretary and two law clerks, probably a cost of around \$250,000 apiece, at the very same time we are asking the GS-4's and 5's to take a cut, to step back.

I would have no problem at all if I were persuaded that the creation of this new court with that additional cost of money at a time when the citizens and the District employees are being asked to take cuts, I would have no problem at all in saying this is worth it to speed up the appellate process.

But Madam Chairperson, I am not persuaded, despite the graphs and charts and vigorous contentions of my colleague, that the creation of the brand new court for the processing of appeals, given the situation that it takes over a year to even get the case, its records and its briefs presented to a court for decision, that the creation of a brand new court is going to make an improvement in the processing of appeals and achieve the objective that we all seek, every one of us, no matter which side of the argument we are on. In this instance we are all interested in prompt and speedy and a fair decision of the appeals brought to us.

It is the means to achieve that end that divides us and I respectfully suggest to the committee that we would be better off to supplement the cuts in the court budget that are being proposed with this Federal funding rather than to create a brand new court with nine judges who will be paid under H.R. 1633 the highest judicial salaries of any judges in the United States except the Justices of the U.S. Supreme Court. I just don't think that sits well at this time.

Thank you.

Ms. NORTON. Thank you very much, Judge Kern.

[The prepared statement of Judge Kern with attachment follows:]

STATEMENT OF HONORABLE JOHN W. KERN III
SENIOR JUDGE, DISTRICT OF COLUMBIA COURT OF APPEALS

On
H.R. 1633, to create a Supreme Court for the District of Columbia
to the
Subcommittee on Judiciary and Education
Committee on the District of Columbia
United States House of Representatives

April 28, 1993

Thank you for inviting me to appear before you, as a senior judge of the District of Columbia Court of Appeals, to comment upon H.R. 1633 insofar as it proposes to create a supreme court for the city and to transfer nine of my colleagues to this new appellate court. I have been a member of the District of Columbia Court of Appeals for 25 years and a resident of Washington, D.C. for 40 years. It is my considered conclusion that the cost of the proposed supreme court -- more delay for the city's litigants and more expenditures by the city on items less than crucial to the City's well-being -- outweighs the benefit accruing to the judges of lessening their workload in order to allow them more time to write their opinions.

My view disagrees with that of the Chief Judge of the D.C. Court of Appeals, but we are used to operating in the context of appellate decision-making where disagreement is common-place but never disagreeable.

Others will undoubtedly point out to this Committee in their testimony that the court has not experienced in recent years any sudden upsurge or any steady upward trend in the number of appeals filed or the cases pending before the court.

It is important to note that of some 1600 appeals filed each year about 800 are dismissed for want of prosecution and another 500 are decided each year in the form of a so-called Memorandum Opinion and Judgment (MOJ). The MOJ is not published, does not constitute precedent, and may be issued only when all three judges conclude affirmance is appropriate and the decision is not of precedential value to the trial court and to the practicing bar.

This leaves about 300 appeals each year for the court to make precedent with its decisions. Congress has empowered the court to hear and decide these appeals either in panels of three judges or *en banc*, depending upon whether a majority of the judges on the court deem the appeal sufficiently important or precedent-setting so as to require decision by the full court. Each year the court chooses to hear and decide about a dozen appeals *en banc*.

H.R. 1633 would create another appellate court and place it atop the present D.C. Court of Appeals and Superior Court for the sole purpose of hearing and deciding those appeals which it deemed in its sole discretion merited *en banc* decision. H.R. 1633 thereby adds an additional layer of appellate review for litigants in the city's judicial system to surmount. Thus, H.R. 1633 will inevitably delay the finality of trial court and agency judgments.

As to the financial cost, Chief Judge Frank Q. Nebeker, a long-time member of the D.C. Court of Appeals and currently the Chief Judge of the newly-created U.S. Court of Veterans Appeals, has pointed out to this Committee the substantial budgetary burden of creating a brand new court in terms of judges, staff support,

and space. It is not surprising that the Department of Justice has consistently opposed the creation of another appeals court for the city and instead proposed improved administration of the present D.C. Court of Appeals.

At present, each judge's caseload is quite commensurate with that borne by other federal appellate judges throughout the country. Thus, Chief Judge Abner B. Mikva of the U.S. Court of Appeals for the District of Columbia pointed out in the Lester W. Roth Lecture at the University of Southern California Law Center (Southern California Law Review, Volume 61 at p. 1357) that the average federal appeals court judge accounts for about 100 published and unpublished opinions each year. Currently, the nine D.C. Court of Appeals judges, who are appointed by the President and paid the same as a federal appellate judge, account for about 90 such opinions per judge. While this may be a demanding workload, it is not unusual. Certainly the cases before the federal appeals court are no less complicated than those arising locally.

Also, it is my understanding that the Congressional Judiciary Committees and the Judicial Conference of the United States routinely apply a standard of measurement in determining whether to add additional judges to the various federal appellate courts that is based upon 255 cases pending on the merits per judge. H.R. 1633 would add nine more judges to the District of Columbia appellate court system upon a workload considerably less than what the other federal courts are carrying.

We must acknowledge that there is continuing criticism of the present D.C. Court of Appeals for the length of time it takes to decide the some 800 appeals presented for its decision each year. The Standards for Reduction of Appellate Delay promulgated by the American Bar Association are not now being met by the D.C. Court of Appeals in its decision-making, as shown below:

Stage of Appeal	ABA Standard	DCCA 1992	DCCA 1987
From Notice of Appeal to Filing of Record	60 days	214 days	256 days
From Filing of Record to Filing of Briefs	70 days	225 days	157 days
From Filing of Briefs to Submission for Decision	60 days	154 days	127 days
From Submission for Decision to Decision	120 days	88 days	107 days
Overall Time on Appeal	280 days	672 days	651 days

However, H.R. 1633 does nothing to remedy this delay in the D.C. Court of Appeals. Indeed, H.R. 1633 would worsen the delay in two respects. First, the Bill removes the judges from the D.C. Court of Appeals and places them on the proposed supreme court, replacing them with nine brand new judges largely unfamiliar with the appellate adjudicative process. Second, it adds to the time consumed by the appellate process -- filing an additional record and another brief in the new supreme court.

The solution to the unusual current delay in the decision-making process of the D.C. Court of Appeals would appear to be (1) to employ effective case management techniques used by other appellate courts to speed up the strictly mechanical task of reproducing the record and to monitor vigorously the filing of briefs by the litigants, and (2) to focus the decision-making efforts of the nine judges of the court on the precedent-setting appeals as opposed to the decisions of affirmance that set no precedent.

The court, in addition to the chief judge and eight associate judges, presently has a decision-making capacity of an additional seven senior judges. The court has attorney resources consisting of the Clerk, Chief Deputy Clerk and five experienced staff attorneys. The court has 25 law clerks in the aggregate.

In sum, the residents of the District of Columbia are entitled to prompt as well as fair decision-making by its courts. They are also entitled to an effective use of the public fisc to improve the quality of life in the City. It is respectfully suggested that the creation of another appellate court composed of nine more judges and attendant support staff will neither improve the administration of justice nor contribute to the public's well-being to justify the use of scarce resources desperately needed for housing, infrastructure and social services in the District of Columbia.

Ms. NORTON. Mr. Herman, former clerk of the court, District of Columbia Court of Appeals.

STATEMENT OF ALAN I. HERMAN, ESQ.

Mr. HERMAN. Thank you, Madam Chairman. I will be brief. I should say that aside from the statement that I request be part of the record, that I submitted to the committee, that I am still committed to efficiency in government, efficiency in the courts and it is part of that devotion, let's call it, I do spend 1 day a week at the very least, 1 morning a week, mediating cases in the small claims court and in other branches of the court.

As a matter of fact, I settled a case yesterday morning that otherwise would have to be heard by a commissioner or a judge. I think that the small claims increase is one I could not agree with more. Of course there would have to be some sort of movement of resources within the court to accommodate the increase in the small claims court and potential decrease in civil division. But I am quite sure they are well up to that.

But I didn't come here to comment upon that. I came here to comment upon a new court.

Back in 1985 or 1986, I had been asked, Do you think that an intermediate court or a supreme court for the District of Columbia is a good idea? I said, well, it is something, I said and I would continue to say back in those days, that, yes, this is something that if not necessary right now will be necessary in the next couple or 3 years, looking at how things were going.

Case Load

Things were going up and they continued to go up through about 1986 or 1987. My service on the court was from 1981 to 1987. At that time for some reason, no matter how many superior court judges, commissioners and employees in the superior court there were, for some reason the number of filings before the court of appeals dropped considerably. It dropped from almost 1,800 down to about 1,540, 1,550. It has continually hovered between 1,550 and 1,650, approximately, every year since.

The increase that I would have predicted to go by 1990 to 2000 and beyond that according to any statistical chart or prediction has not occurred for whatever reason. I can't explain why the filings aren't there but the filings are not there and the current court composed of nine active judges and supported by seven senior judges seems perfectly capable of handling that case load. They disposed of that many cases every year, for that matter, in the last 6 years you will see in my statement.

In the last 6 years the pending case load of the court has been reduced by 300 or more cases. So, that dispositions have actually over time reduced the case load of the court—the pending case load of the court for whatever reason.

Judges—Appeals

Briefly, my suggestion is that it is not yet necessary to formulate a new and create a new court. We have added as has been said many judges to the superior court. An addition of one, two, three

or whatever is necessary temporarily or permanently to the court of appeals, it seems to me, would take care of any backlog that was a result of stopping the philosophy that we don't want our litigants to hurry up and wait so that if court rules were enforced and there were a large backlog created at the end of the pipeline because of that, that could be coped with temporarily or if necessary permanently by the addition of other judges.

Federal courts of appeal circuits have many more than nine judges on them around the country and seem to cope with much higher case loads.

In brief, that is my statement. I do think that my opinion is that \$15.5 million over 6 years would not be nearly adequate to fund what is required now for another level of court and that the resources necessary for such a court would far better be spent in other programs far more necessary in the District of Columbia than another court level.

Thank you.

Ms. NORTON. Thank you very much, Mr. Herman.

[The prepared statement of Alan I. Herman follows:]

STATEMENT OF ALAN I. HERMAN, ESQUIRE
FORMER CLERK OF THE COURT
DISTRICT OF COLUMBIA COURT OF APPEALS
ON
H.R. 1633, to create a Supreme Court for the District of Columbia
to the
SUBCOMMITTEE ON JUDICIARY AND EDUCATION
COMMITTEE ON THE DISTRICT OF COLUMBIA
UNITED STATES HOUSE OF REPRESENTATIVES

April 28, 1993

Thank you for the invitation and opportunity, once again, to present a statement to the Subcommittee. It is indeed a compliment that you feel my views regarding this legislation are pertinent.

As a member of the District of Columbia Bar, a former Clerk of the District of Columbia Court of Appeals, a student and former teacher of judicial administration, and one still involved in areas of legal administration, I have maintained a sincere interest in the efficient administration of the courts of the District of Columbia.

I indicated to the Subcommittee in 1989, "A few years ago, if I was asked whether the District of Columbia court system was going to need an intermediate appellate level of courts during the next few years, I would have answered yes. This opinion was based on the fact that 1. case filing were rising, 2. future filings predictions, based on Superior Court caseload and new legislation, indicated substantial increases, and 3. the methods the Court was using to manage and dispose of cases limited its capacity.

"Today [1989], after studying court statistics, reports, and recent actions of the court to solve the problems of delay, I must reach the opposite conclusion: I believe the District of Columbia courts will function far more efficiently, with fewer delays and at far less cost to the public, under the current two-tier court system."

In the ensuing three and a half years since that statement, I have not changed my mind. In fact, the improvements in the courts during that period have made me believe even more firmly that a two-tier court system continues to be the most effective one for the District of Columbia.

I. Workload

Appellate courts' incoming cases, or filed appeals, are a gauge of their workload. During the early to mid- 1980s, case filings showed a gradual increase to the point where they almost reached 1,800 filings in 1986 and 1987. Thus, a normal progression would have had filings well over 2,000 a year by 1990 and even more by now. New legislation and an increase in trial court judges were expected to lead to much higher filed appeals. The fact is, however, that for whatever reasons, filings decreased to 1,540 in 1988 and have not come anywhere near the highs of 1986 and 1987 since that time.

The Court of Appeals, as presently constituted and administered, was well up to the task of processing and adjudicating the appeals filed. In fact, as reported by the Court, for the six full years of 1987 through 1992, it received 9,615 new filings, and disposed of 9,923 cases, reducing its pending caseload by more than 300 cases. The Court must be complimented for this accomplishment, as well the fact that for the first three months of this year, it has disposed of almost fifty more cases than were filed during the same period, further reducing the pending cases.

II. Delay

Delay has been an ever-increasing concern for the District of Columbia Court of Appeals for many years. The American Bar Association Standards for appellate decisions suggest that an average of 280 days transpire between the filing and the decision of a case. In 1980, this average time in the Court of Appeals was 474 days; in 1992, it was 672 days. I believe that it is this delay, more than any other factor, which has caused several organizations to suggest that another court was needed, hoping that it would reduce the delay to reasonable proportions.

As the Subcommittee is aware, the processing of an appeal involves several stages: obtaining the record and the transcripts from the trial court, getting the parties' attorneys to file briefs, scheduling oral argument if necessary, and finally,

deciding the case. For the most part, appellate judges are not involved in the initial stages of the appeals; ultimately, when argument is scheduled, or a case is submitted without argument, the record and briefs are provided to the Judges. I remind the Subcommittee of this process only to point out that the vast majority of the delay at the D.C. Court of Appeals resides in the processing of the cases before the Judges receive them; the time the Judges have been taking, on average, to decide cases is well within the American Bar Association standard of 120 days. In 1980 it was 105 days; in 1992, it was 88 days.

The periods which in fact do create the delay are in obtaining the record and transcripts (214 days vs. 60 days by court rule), and filing of briefs (225 days vs. 75 days called for by court rule); with regard to the third period, from completed briefs to argument or submission of the case to the Court, after some improvement in 1990 and 1991, it is once more taking an average of over five months to place a case before the Court. The ABA Standards call for 60 days.

The simple fact is that improvements in administration, particularly full implementation and enforcement of the Court's case management plan which went into effect in 1989, should reduce the delay prior to submission to the Court. Once again, permit me to quote from my statement before this Subcommittee in 1989: "There is no doubt that if strict adherence to the orders scheduling the filing of the record, briefs and motions, and the

argument or submission of the case, is followed, the delays which have plagued the Court in the past will eventually disappear.... Moving the cases more quickly through the appellate process will have one predictable and unavoidable result. There will be a large number of cases ready for oral argument (if not submitted without argument) and decision with which the Judges must deal."

A reluctance to create such a "backlog" by speeding up the production of records, transcripts and briefs is sometimes based on a philosophy that litigants and attorneys should not be forced to "hurry up and wait." This philosophy assumes that the Court is unable to hear and decide more than a given number of appeals each month or year.

Please permit me to address the matter of dealing with the predicted increase in "ready cases" in section IV below.

III. Pending Cases ("Backlog")

Appellate court administrators measure "backlog" in several ways. The simplest measure is the number of cases at all stages of appeal (from just filed to awaiting decision). Another measure is the number of cases ready and awaiting argument before the Court. A final measure is the number of cases already heard or submitted to the Court, awaiting decision and opinions of the Judges; I shall not address this measure, as it falls within the purview of the Judges.

-- At the end of 1992, the total number of cases pending in the Court was 2,064 (reduced to 2,015 at the end of March, 1993). Approximately two-thirds of this number were still awaiting one or more documents or pleadings in the Clerk's Office. The balance had either been heard, were scheduled to be heard, or were awaiting scheduling. As I mentioned above, one measure of backlog or delay is the number of cases ready but not scheduled for the Judges. This will vary throughout the year, increasing substantially during the mid-summer months when the Court does not hear argument. In general, these cases comprise a backlog of from two to four months of cases to be scheduled for argument; in my opinion, this has not been a serious backlog.

Unfortunately, I am confused by the Court's chart depicting backlog, which appears to be comprised of cases pending at the beginning or end of a year, added to which are the cases filed during the year. In my experience, backlog is defined as of a given point in time. Thus, it would consist of all cases pending at the beginning of a year, end of a month, end of a year, or on a given day, which would reflect those cases which had been disposed of to that point. Adding end of year pending cases to cases filed within the year counts most of the annual filings twice, because most filings have not reached the decision stage.

I next invite the attention of the Subcommittee to the methods by which the Court disposes of cases. Most familiar are published opinions and unpublished. Other less familiar methods are by judgment without opinion and by order. Orders, signed by

the Chief Judge alone, dispose of hundreds of cases each year without the necessity of argument or a decision on the merits of the case by the Court. Most of these are withdrawn appeals or those dismissed for lack of compliance with court procedure. Traditionally, this has accounted for between 40 and 50% of all dispositions. Thus, one must conclude that the same percentage of cases filed each year will be decided in that manner, not calling on Judges other than the Chief Judge to consider or act in those cases.

IV. The Alternatives

As alluded to above, a solution to the lengthy delays of cases in the Clerk's office would without doubt temporarily create a large number of cases awaiting argument before or submission to the Court. Several solutions have been proposed to this problem in the past, and nothing new has come to mind, short of limiting the right of appeal.

1. Judges may be temporarily reassigned from other benches, e.g. the Superior Court.

2. Judges may be added to the present Court.

3. A new appellate court may be created.

With regard to solution 1, although in the past trial court judges have been permitted to sit on panels of the Court of Appeals, this was not a measure to reduce workload, but primarily

to provide experience and empathy for the trial court judge. As burdened as the Superior Court is with its work, this is not a tenable organized solution to the potential backlog. However, utilizing the services of the seven Senior Judges of the Court of Appeals to the extent they are willing could supplement other temporary measures.

With regard to the current legislation which would create another level of appellate review, my view in the 1989 statement to the Subcommittee has not changed:

"The problems [sic] the Court has been facing up to this point has not been a lack of judges or a significant increase in cases over the past few years; it has been one of delay from the date of filing to the point where a case is ready for argument.... The backlogs of cases awaiting argument which will result from the [Case Management] Plan should be temporary, unless case filings increase substantially over the next few years. [They did not.] Interposing a new Court between the Superior Court and the District of Columbia Court of Appeals can only exacerbate the delays, as additional briefs and arguments would be required at the intermediate level, and the highest court would still be required to review for grants or denials of appeal. Litigants would wait even longer to achieve finality in their lawsuits."

Thus, once again I suggest that the solution to the problem facing this Court and the temporary backlog that would result from proactive resolution of the current delays is the appointment of additional Judges to the present Court. How many would be necessary and whether they would necessarily be temporary or permanent could be determined by empirical study of historical data and assumptions with regard to numbers of cases, goals, and setting reasonable argument schedules. A Court which has had the proven ability to dispose of 1,600 or more cases each year should have little problem in reducing overall delay, where the total number of cases at all stages before it number 2,000.

One further observation is necessary in these times of severe fiscal restrictions on federal, state and local levels. Since 1989, when I pointed out the budgetary implications of a new court on other agencies having substantial appellate work before this Court, viz., D.C. Corporation Counsel, the United States Attorney's Office, Public Defender Service and Criminal Justice Act funding, budgets have become far more constricted, and judges' salaries have increased substantially. A new building for another level of court may well be required because of the space limitations in the current facilities. The cost of this premature legislation, a luxury at best in these times, is far greater than it ever has been. To this citizen, administrator and attorney there appear to be so many other priorities the District of Columbia must address, this

legislation should be considered only after all other alternatives have been earnestly attempted.

I reiterate my sincere appreciation of the Subcommittee's invitation for my remarks, and for the attention given to this legislation.

Ms. NORTON. Could I ask both of you the following question. At what point would either of you be ready to support structural change with the addition of another court? What would you have to see in order to believe that another court was necessary or is it your view that in this jurisdiction another court should never be necessary?

Judge KERN. Well, speaking first I never want to say never, but the first and most important accomplishment of the D.C. Court of Appeals that I think should be done before we seriously consider creating another court is to reduce the amount of time it takes to file a record and the amount of time it takes to file the briefs to the recommended standard of the American Bar Association.

In 1987 it took 256 days to file a record. That is just a mechanical process of making copies of record and getting the reporter's transcript.

Now, with the addition of several more machines or addition of several more reporters or whatever, I am not in an administrative position as are the two chief judges, it certainly should be possible to reduce that figure. In 1992 it was 214 days—the simple process of filing the briefs. In 1987 it took 157 days. In 1992 it took 225 days.

Ms. NORTON. Was that a burden on the court? Now, I can understand the paper-work burden. I can understand the delay but what—

Judge KERN. Not at all, but my point is unless and until we get those figures down to the ABA standard, I think that we are all concerned with delay. We all believe justice delayed is justice denied. How will we be able to reduce the delay?

Backlog—Appeals

It seems to me that the first step—right now we are in the embarrassing position of saying to the litigants if we are pressed, "Gee, litigants it is taking over a year to process your appeal to the point where a division of judges, whether it is three judges or nine judges can even decide your case."

That simply is unacceptable and I would say the first step is to get those two mechanical processes reduced. Then the second process would be to say we have used the nine full-time judges and the seven half-time judges. Our court is composed of nine chief judges and eight associate judges and seven senior judges, as you say, to organize them in such a way that the judges are disposing of the cases in an effective manner.

Ms. NORTON. Let me understand. So you think that the judges themselves are inefficient?

Judge KERN. No, not at all. I don't think the judges are inefficient. I think the system is inefficient. Therefore, I think that when you add another court to the top of the present system, you are simply not aiming your important contribution, which is Federal funds, to where the system needs improvement.

Ms. NORTON. You would like to see both of those done. As I look at what has happened to the court over time, leaving aside your front-end paperwork concerns, which I am sure one might be able to deal with easier than the problem of disposition of cases, one

sees that dispositions have risen from 1971 through 1992 and yet there is a backlog.

Are you suggesting that if the court simply deals with the front-end concerns of how long it takes to get the appeal perfected, the hurry up and wait problem that Judge Rogers spoke about that somehow the court could handle appeals far more rapidly and far more efficiently, your problem is you are not receiving these appeals fast enough; give us some more and you will see that the court is much more efficient. We need more of these appeals to get here quicker. That is how I read what you are saying.

Judge KERN. I would put it as our problem. That is the litigant cannot achieve a decision by a court. The court could have 20 judges on it. There could be two courts. The litigant cannot receive a decision until there are presented to the court the two important elements that are prerequisites to decisionmaking. Namely, a record and a brief.

As you know, many appeals are filed. A notice to file an appeal is filed—

Ms. NORTON. Judge Kern, if you will forgive me. I am really trying to get at the nub of the problem. I am really trying to ascertain where the problem is in the system. Are you saying that the problem in the system is with perfecting the appeal and not with disposing of cases by the judges themselves?

If you had to pinpoint where the greater problem was or what could be done to enable the disposition of cases to proceed more rapidly, would you say it would be in allowing the perfection of appeals to become more efficient and more rapid?

En Banc Decisions

Judge KERN. Yes. Mr. Herman; just remember that the Congress right now has empowered us to hear and determine appeals by a division of the court and if the court so chooses—the majority of the court—if nine judges choose the court can hear it en banc.

My experience differs from that of Chief Judge Rogers. I have never heard of a judge on our court saying, they may think it but they have certainly never said, I will not allow this case to be heard en banc or rehear en banc because we just have too many cases and I don't have the time.

So my point is that a case can be heard en banc. We are authorized to perform the en banc process as well as the decisional process.

But I think if Mr. Herman might have a thought on that, I don't want to monopolize—

Ms. NORTON. It is authorized and, therefore, it happens.

Judge KERN. We are authorized, and it happens.

Ms. NORTON. You are authorized. In other words, you would not anticipate that the court might feel more inclined to hear some cases en banc if, in fact, it did not have as many cases pending before it?

Judge KERN. That is right. I mean, I believe my colleagues have the integrity to make a decision on the basis of is this case of significance or is this case contrary to existing law.

If it is, we have to hear it en banc.

Ms. NORTON. You have to hear it en banc?

Judge KERN. Correct; and be consistent with our oath. We are not required by statute, but I am simply saying that a judge would say, yes, we have to hear it en banc.

Ms. NORTON. Judge Kern, making this an ethical requirement, it seems to me, is to do a disservice to the court. You know full well that this is a judgment call, and there would be close calls which might well be affected by whether or not one was doing a disservice to other litigants by, in fact, having an en banc hearing in all the cases that one might like.

I would anticipate that even if one got all the judges one wanted, one might make those close calls one way or the other, depending on a large number of factors, including whether or not one was doing justice to others or injustice to others by having en banc every time one really wanted to make sure that a major question of policy would not be enlightened by an en banc hearing.

The notion that is mandatory and that there is an ethical issue involved, I must say to you as a member of the bar, goes contrary to my own experience. I would not want to leave the record that a court would be in violation of the mandate or of ethical standards if it decided not to have en banc hearings where it might otherwise think that they could be enlightening and help in the formulation of case law and policy. I just want to differ with you right here on the record, understanding your view.

Mr. Herman, would you like to respond as well?

Mr. HERMAN. Yes. But since I am not privy to judges' conversations, I won't comment at all upon the en banc problem. I would say that the judges of the D.C. Court of Appeals are, in fact, quite efficient. If you look at the ABA standards regarding how long it takes to decide a case once it has been submitted to the court, they would say that, on average, it should be 120 days. The court has done quite well in that area.

In fact, they have not exceeded 120 except for, I think, in 1 or 2 years. In fact, it was 88 days in 1992. So the court, once the case gets to the court, it is efficient. It is a question of getting the case to the court.

When would I be ready to say—

Ms. NORTON. Wait a minute. Let me understand. You want the cases to get to the court more quickly so the existing number of judges, faced now with a larger number of cases, could be more efficient in disposing of that larger number of cases?

Backlog—Appeals

Mr. HERMAN. Yes, Madam Chairman. I would suggest—and I did allude to the fact that if the process was speeded up, the paperwork was speeded up, and the litigants were required and the superior court personnel were required to submit their briefs on time, then there wouldn't be this backlog created.

Let me say there will always be a backlog, whether it is 200 cases just filed or whether there is 5,000 cases. There is always going to be a backlog. Where that backlog becomes unendurable is perhaps, the point—and efficiencies are no longer capable—that,

perhaps, is the point at which one should study whether another court level would be necessary.

As I said, the additional judges that I would suggest should be able to take care of any temporary backlog which is resulting from an immediate influx of cases from the paperwork level.

Ms. NORTON. By the way, Mr. Herman, you were the clerk of the court between what years?

Mr. HERMAN. 1981 to 1987.

Ms. NORTON. Could I ask both of you to comment briefly on what you believe is wrong with four studies that argue exactly contrary to your view here and what is wrong with the D.C. Bar and its leadership that they—that it appears to believe an additional court is necessary?

Could you point to me the flaws in the thinking of those—all of those, apparently, who have studied this matter in any depth?

Judge KERN. Well, the D.C. Bar divided on the committee that studied this problem, so our views are not so outlandish since they were echoed by members of the committee that studied the problem.

As to the bar association of the District of Columbia, the same statements that we made, the same record that you have before you, was made available to the D.C. Bar Association.

I don't think the D.C. Bar Association studied the matter in depth as much as the D.C. Bar as to the National Center for State Courts. I am not aware of exactly what process was followed by them. They certainly—I don't know whether they had the full total of delay that occurred in the filing of the record and the filing of the briefs.

Mr. HERMAN. Madam Chairman, I should say that those studies were made some time ago when it did appear that the court case load was increasing and did not show—it did not appear as though it was going to be reduced.

I would suggest that another study be made at this time by an objective organization.

Judge KERN. I might say also that the Department of Justice has consistently taken a position contrary to adding another court.

Ms. NORTON. We will be receiving testimony from the Department of Justice for our record, and I anticipate that the position will be contrary to the position taken by the Department before.

I wonder, since you can't tell me in any detail why these studies—except to say maybe they need a new study. That makes everybody's eyes glaze over with a hearing record of 1,200 pages, with four studies, with the leadership of the bar still pressing us to pass this piece of legislation.

In any case, we do have some objective basis to go on outside of our own jurisdiction, because in States with comparable appellate workload, indeed in each and every one of them, the legislatures have established intermediate courts.

Intermediate Court

In addition, the American Bar Association Standards and Regulations, in fact, says that when the volume of appeals can't be satisfactorily resolved, what you ought to do is establish an intermedi-

ate court. It doesn't say add some more judges to the court. It doesn't say speed up the front end. It says at that point you know you have a structural problem.

On what basis do you disagree with the ABA standards relating to court organization? On what basis do you disagree with every State legislature with a court with a comparable workload having now established an intermediate court?

Judge KERN. Well, the Congress itself has compared our workload to those of the Federal courts.

Ms. NORTON. But I am not. I am comparing—my question had to do with the comparable—with the State legislation.

I wish, when I ask questions, Judge Kern, that you would answer the question that I ask, because it really helps the record for me to get a direct answer to my question.

I would like to know on what basis you would have us to deviate from what every State legislature with a court two-tier system with a comparable workload has done and what basis would you have us—objective basis now—to ignore the recommendation of the ABA?

Judge KERN. Well, I think the ABA has recommended that our court perform according to certain standards in connection with its stages of appeal. We have not met those standards.

Ms. NORTON. Mr. Herman, do you have an answer to that as well?

Mr. HERMAN. I am afraid I don't, without knowing what went into the decision of each State when it created an intermediate court of appeals.

Ms. NORTON. You think whatever it is, we must be different from all of them?

Mr. HERMAN. I think many times there are political considerations within each State which may govern that.

Ms. NORTON. That would lead them uniformly to do the opposite of what you recommend we do?

Mr. HERMAN. Yet, Madam Chairman, there are a number of States that still do not have intermediary courts.

Ms. NORTON. The majority of States do have an intermediate court. Those with our appellate workload all have intermediate courts. We are faced with that evidence. If we accept your advice, we ought to have some concrete reason for saying, in spite of the fact that everybody who looks like us has an intermediate court. We should not respond to what the bar says, what our own judges say, and what four studies say.

Therefore, I am looking for some objective evidence on the other side to weigh here in response.

Judge KERN. Is that a question of us?

Ms. NORTON. Yes. I am saying, in light of the fact that this is—this is pretty strong stuff, when everybody comes back saying, you ought to do it when it gets to this point and you are saying, no, don't do it.

I am saying, if you were in our position and the ABA said do it, four studies said do it, your bar said do it and your judges said do it, would you do it?

Judge KERN. As long as the Department of Justice says don't do it, as long as members of the committee of the D.C. Bar said don't

do it, as long as you have—at this very moment, we are speaking of such an extraordinary period of time of delay between the notice of appeal and the case being submitted to the court, I think there are reasons not to do it.

Mr. HERMAN. I still would have to point to the objective fact that the judges are disposing of some 1,600-plus cases a year and are doing it within the time standards that the ABA sets.

Ms. NORTON. That I can understand, Mr. Herman. I must say I am almost appalled to hear you say that. In other words, as long as these judges with the rising case loads are willing to dispose of increasing number of cases, don't give them any help, even though judges in other courts with comparable work loads are all getting additional help.

Are you suggesting this court ought to be punished for its efficiencies?

Judges—Appeal

Mr. HERMAN. Absolutely not, Madam Chairman. That is why I suggested additional judges would help them out.

Ms. NORTON. Perhaps what?

Mr. HERMAN. Additional judges would help them out.

Ms. NORTON. So you believe there is a problem but not one that requires structural change?

Mr. HERMAN. Yes, Madam Chairman.

Ms. NORTON. You, at least, disagree with Judge Kern that all the problem is in the paperwork in the front? You think the judges do need some help?

Mr. HERMAN. Madam Chairman, I don't disagree that the paperwork is the problem. I agree with that fact, that the paperwork is the problem and the judges are not.

Ms. NORTON. But you said you would like to have two more judges.

Mr. HERMAN. I would, to take care of the backlog that would be created by speeding up the paper process.

Ms. NORTON. Might I just say to you, Mr. Herman, that your use of figures over a period of a few years is interesting, but I think not the way any legislative body ought to judge increases or decreases.

The graph in chart 1 of whose testimony—this is Judge Rogers' testimony—which goes from 1971 to 1992, is in my judgment the kind of evidence that a legislative body ought to consider when considering a structural change.

It is true that in a period of a few years that there will be fluctuations, and one should not make structural decisions on the basis of fluctuations that may be whimsical, come from the pattern of a few years.

But I have to tell you that I consider this pattern even of dispositions. That is where I am looking to tell its own story. I am reluctant to say in the face of so many studies that our jurisdiction should remain in the minority among those who decided that the time for structural change has come.

I believe you have made the most of the arguments that you have. I have to just say for the record that I do not find them compelling; that they do rely on the front end of the process; punish, I

think, the court for its efficiencies; and ultimately leave us who are concerned that the justice system in the District of Columbia, civil and criminal, needs help without much to expect in the way of relief.

What we, perhaps, need to know more about is the experience of courts after they have gotten an intermediate court.

As a lawyer and something of a scholar still—because I still teach law—I would be interested in knowing more about that experience. It may be that before the record closes, Judge Rogers or Judge Ugast might consider putting in the record any information they have that might clarify whether or not this structural change will help, because, very frankly, my only interest in it is that this structural change help, not unmindful of the fact that there would be a very small amount of money but more money involved.

We cannot guarantee, even if we pass this bill in the Senate or the House, that more money would be forthcoming in a year where everybody is taking cuts. But we do need to settle this question once and for all.

They have colleagues in the Senate that are convinced that the time has come. I think the majority of the House is convinced, given the way in which these hearings and even a floor vote once before has gone.

I very much appreciate your testimony. Nothing like this kind of change should be made without the kind of instructive, helpful testimony that comes from those who disagree and really serves to focus this committee on whether or not we are making the right decision in whatever way we choose to vote.

So I am particularly appreciative to you, Judge Kern and to you, Mr. Herman, for taking the time to come to testify this morning.

Mr. HERMAN. Thank you, Madam Chairman.

Judge KERN. Thank you.

Ms. NORTON. The subcommittee will adjourn until Thursday May 6, 1993, at 10 a.m. Thank you.

[Whereupon, the subcommittee adjourned, to reconvene at 10 a.m., May 6, 1993.]

[The following additional material was subsequently received for inclusion in the record:]

CONGRESS
of the
United States of America

Ways and Means Committee

Andy Jacobs, Jr.
April 22, 1993

Mr. Broderick Johnson
Staff Director
Subcommittee on Judiciary and Education
1310 Longworth Office Building
Washington, D.C.

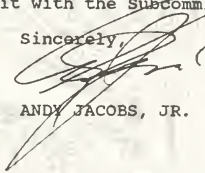
Dear Mr. Johnson:

I would be pleased if this letter could be included in the hearing record with regard to the proposal to create a District of Columbia ~~Supreme~~
~~Court~~.

Several months ago, I asked the United States General Accounting Office to make a study of the case load and other aspects of the proposal to create the new court.

When the report is made available to me, I shall be happy to share it with the Subcommittee.

Sincerely,



ANDY JACOBS, JR.

AJ/dm

FOR IMMEDIATE RELEASE
CONTACT: Donna Brazile
(202) 225-8050

COMMITTEE ON THE DISTRICT
OF COLUMBIA
U.S. House of Representatives
1310 Longworth HOB
Washington, D.C. 20515
Telephone: (202) 225-4457
April 23, 1993

SUBCOMMITTEE TO HOLD HEARING ON BILL TO
CREATE A SUPREME COURT FOR DISTRICT OF COLUMBIA

Washington, D.C., April 21 -- District of Columbia Delegate Eleanor Holmes Norton, Chairwoman of the Subcommittee on Judiciary and Education of the District of Columbia Committee, announced today that the Subcommittee will hold a hearing on a bill to create a Supreme Court for the District of Columbia (H.R. 1633). The hearing is scheduled for Wednesday, April 28, 1993 at 10:00 a.m., in 1310A Longworth House Office Building.

Invited witnesses include the Honorable Judith W. Rogers, Chief Judge, D.C. Court of Appeals; the Honorable Fred B. Ugast, Chief Judge, D.C. Superior Court; John Payton, Esquire, Corporation Counsel for the District of Columbia; the Honorable John W. Kern, III, Senior Judge, D.C. Court of Appeals; Alan I. Herman, Esquire, Consultant, Legal Counsel for the Elderly (AARP); and a representative of the U.S. Department of Justice.

Oral testimony will be heard from invited witnesses only. However, any individual or organization may submit a written statement for consideration by the Committee and for inclusion in the printed record of the hearing.

BACKGROUND

H.R. 1633 is part of an on-going legislative effort to assist the District of Columbia in fighting crime. Previously, legislation was passed to authorize funds to hire 700 additional police officers in the District and to create a community-oriented police department. Also, eight judges were added to the D.C. Superior Court.

H.R. 1633 would establish a seven-member Supreme Court for the District of Columbia by elevating the present nine-member Appellate Court and, by attrition, allowing the size to diminish to seven. The President would appoint nine new judges to the appellate division. The bill also calls for adding four new judges to the Superior Court and it would change the make-up and size of the Joint Committee on Judicial Administration. Under the new bill, there would be a seven-member joint committee, made up of the Chief Judge of the Supreme Court, two associate justices; the Chief Judge of the Appellate Court; and the Chief Judge of the Superior Court and two associate judges.

#

DETAILS FOR SUBMISSION OF WRITTEN COMMENTS:

For those who wish to file a written statement for the printed record of the hearing, six (6) copies are required and must be submitted by the close of business, Wednesday, April 28, 1993, to Broderick Johnson, Staff Director, Committee on the District of Columbia. An additional supply of statements may be furnished for distribution to the press and public if supplied to the Committee office, 1310 Longworth House Office Building, before the hearing begins.

FORMATTING REQUIREMENTS:

Each statement presented for printing to the Committee by a witness, any written statement or exhibit submitted for the printed record or any written comments in response to a request for written comments must conform to the guidelines listed below. Any statement or exhibit not in compliance with these guidelines will not be printed, but will be maintained in the Committee files for review and use by the Committee.

1. All statements and any accompanying exhibits for printing must be typed in single space on legal-size paper and may not exceed a total of 10 pages.
2. Copies of whole documents submitted as exhibit material will not be accepted for printing. Instead, exhibit material should be referenced and quoted or paraphrased. All exhibit material not meeting these specifications will be maintained in the Committee files for review and use by the Committee.
3. Statements must contain the name and capacity in which the witness will appear or, for written comments, the name and capacity of the person submitting the statement, as well as any clients or persons, or any organization for whom the witness appears or for whom the statement is submitted.
4. A supplemental sheet must accompany each statement listing the name, full address, a telephone number where the witness or the designated representative may be reached and a topical outline or summary of the comments and recommendations in the full statement. This supplemental sheet will not be included in the printed record.

The above restrictions and limitations apply only to material being submitted for printing. Statements and exhibits or supplementary material submitted solely for distribution to the Members, the press and the public during the course of a public hearing may be submitted in other forms.

MARKUP OF H.R. 1633, TO CREATE A D.C. SUPREME COURT

Wednesday, June 9, 1993

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE DISTRICT OF COLUMBIA,
Washington, DC.

The committee met, pursuant to call, at 10:27 a.m., in room 1310-A, Longworth House Office Building, Hon. Fortney Pete Stark (chairman of the committee) presiding.

Members present: Representatives Stark, Dellums, McDermott, Norton, Jefferson, Bliley, Saxton, and Ballenger.

Majority staff present: Broderick D. Johnson, staff director; Dietra L. Ford, senior legislative associate; Dale MacIver, senior staff counsel; Ronald C. Willis, subcommittee staff director; David Julyan, Marvin R. Eason, and Rene Carter, staff assistants; and Louise Winston, research assistant.

Minority staff present: Dennis G. Smith, staff director; David Anderson, chief counsel; Matthew Farley, Laurie Bink, Rick Dykema, and Ashley Rehr, staff assistants.

The CHAIRMAN. The committee will convene.

The bill is the supreme court bill, H.R. 1633. I understand it is agreeable to discharge that bill from the Subcommittee on Judiciary and Education, and the Chair would entertain such a unanimous consent request.

Ms. NORTON. I move that the Subcommittee on Judiciary and Education be discharged from further consideration of H.R. 1633, Mr. Chairman.

The CHAIRMAN. Is there any objection?

[No response]

The CHAIRMAN. Without objection, the subcommittee is discharged.

Under committee rule A-4, each member may address the committee for 5 minutes, and I will try and keep my comments under that.

The court system for the District of Columbia was organized in 1970. Local courts of general jurisdiction were established, instead of the previous system of Federal courts handling many local civil and criminal cases.

H.R. 1633 does a number of things. It adds four trial judges to the D.C. Superior Court, and hopefully to relieve growing case load crowding on the present 58 trial judges. It would leave most of the court system the same, but would increase the number of judges

handling appeals and split the appeals function between two sets of judges.

The highest local court at present is called the court of appeals. Six months after the President signs H.R. 1633, those nine justices of that court would comprise the Supreme Court of the District of Columbia. By attrition, that court will eventually carry only 7 members.

The Nominations Commission set up in the Home Rule Act must, within 4 months after the enactment of this bill, forward to the President 27 names from which the President will select 9 nominees as replacements on the D.C. Court of Appeals, and that court will then function as an intermediate court of appeals between the trial court, called the superior court, and the new supreme court.

The purpose of H.R. 1633 is twofold. It is to eliminate approximately 20-month wait to get an appeals decision in the District of Columbia, and it is also maintained that a separate court is needed to give more time and consideration to developing the law.

I understand that several of my colleagues will have amendments to offer to this bill and the Chair is prepared to act on those in the order that they are offered. The Chair's own feeling on this is that in the spirit of home rule the District should be allowed to structure their court system as they choose, and it is my understanding that this is the desire of the District government.

I would now yield to the Chair of the Subcommittee on Judiciary and Education, which held a hearing on the bill, the gentlewoman from the District of Columbia, Ms. Norton.

Backlog—Appeals

Ms. NORTON. Thank you, Mr. Chairman. Mr. Chairman, let me remind my colleagues that when we started this process in 1988 the appeals court had a 12- to 15-month backlog. Today, that has nearly doubled to between 22 and 24 months. Such delays surely cannot be tolerated in the face of the mounting crime in our city and increasing court congestion with court cases of every kind.

At the appropriate time, Mr. Chairman, I will offer 3 amendments that I believe will improve the bill considerably. One of the amendments was requested by the chief judge of the superior court, Fred Ugast, and will elevate the hearing commissioners to the status of magistrate and with limited extension of their duties.

Hearing Commissioners

During the course of last year's hearings on the supreme court bill I offered an amendment that struck the section of the bill regarding the hearing commissioners. However, after careful consideration of the need for a limited expansion of the duties of the commissioners, which I believe will make the court more efficient and reduce time and expense, I agreed to the amendment requested of me that I intend to offer this morning. I will give a full explanation of the amendment at that time.

In closing, let me assure my colleagues on both sides of the aisle that the need for a District of Columbia Supreme Court has not di-

minished but increased with time. I ask that my entire statement be admitted to the record.

The CHAIRMAN. Without objection, the gentle lady's entire statement will be inserted in the record.

[The prepared statement of Ms. Norton follows:]

OPENING REMARKS OF
THE HONORABLE ELEANOR HOLMES NORTON
CHAIR, SUBCOMMITTEE ON JUDICIARY AND EDUCATION
BEFORE THE
COMMITTEE ON THE DISTRICT OF COLUMBIA
ON
MARKUP OF H.R. 1633
DISTRICT OF COLUMBIA SUPREME COURT BILL
WEDNESDAY, JUNE 9, 1993 9:30 A.M.

Thank you, Mr. Chairman. First, let me remind my colleagues that when we started this process in 1988, the Appeals Court had a 12-15 month backlog. Today, that has nearly doubled to between 22-24 months. Such delays surely cannot be tolerated in the face of the mounting crime in our city and increasing court congestion with court cases of every kind.

H.R. 1633, the District of Columbia Supreme Court bill, had

its origin in 1986 when Chief Judge William Pryor engaged Judiciary and Education Chair Mervyn Dymally in considerable discussion about the creation of a Supreme Court for the District of Columbia court system. That was followed by a series of subcommittee hearings, both in the 100th and 101st Congress, with a bill similar to H.R. 1633 passing the House in the closing days of the 101st Congress.

During the early days of the 102nd Congress, I joined with Judiciary and Education Subcommittee Chair Mervyn Dymally, in cosponsoring H.R. 568 which, like the bills introduced in the 100th and 101st Congresses, would have established a Supreme Court for the District of Columbia court system. H.R. 568 was reported favorably by the full committee to be sent to the full House for its consideration. And now, here we are at the beginning of the 103rd Congress, seven years after Judge Pryor began his quest and five years after the first bill was under consideration, once again trying to resolve what should not be a controversial issue by any stretch of the imagination.

Mr. Chair, H.R. 1633, like the bills before it, establishes a supreme court for the District of Columbia.

1. As introduced, H.R. 1633 establishes a seven-member Supreme Court by elevating the present nine-member Appellate Court and, by attrition, allowing the size to diminish to seven. The President would then appoint nine new judges to fill the appellate division.
2. It provides for four additional Superior Court judges, two to be appointed by the President in October, 1993; two to be appointed by the President in October, 1994.
3. It changes the make-up and size of the Joint Committee on Judicial Administration. Presently, the Committee has five members, two from the Appellate and three from the Superior Court. Under H.R. 1633, there would be a seven-member joint committee made up of the Chief Judge of the Supreme Court, two

associate justices; the Chief Judge of the Appellate Court; and the Chief Judge of the Superior Court and two associate judges. In addition, it provides that by FY 1996, this committee will consider the efficacy of the make-up of the Joint Committee on Judicial Administration.

4. It authorizes \$16.2 million over a ^{five}~~four~~-year period beginning with FY '94 and ending in FY '99.

At the appropriate time, Mr. Chairman, I will offer three amendments that I believe will improve the bill considerably.

One of the amendments was requested by Chief Judge of the Superior Court, Fred Ugast, and will elevate the hearing commissioners to the status of Magistrate and with a limited extension of their duties. During the course of last year's hearings on the Supreme Court bill, I offered an amendment that struck the section of the bill regarding the hearing commissioners.

However, after careful consideration of the need for a limited expansion of the duties of the commissioners, I agreed to the amendment that I intend to offer this morning. I will give a full explanation of the amendment at that time.

In closing, let me assure my colleagues on both sides of the aisle that the need for a District of Columbia Supreme Court has not diminished with time.

Ms. NORTON. Mr. Chairman, may I also offer for the record a letter from the White House endorsing this bill?

The CHAIRMAN. Without objection.

[The letter follows:]

THE WHITE HOUSE
WASHINGTON

June 9, 1993

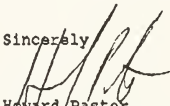
Dear Representative Norton:

Thank you for requesting the views of the Administration on H.R. 1633, the "District of Columbia Judicial Reorganization Act of 1993."

The Administration believes that the Government of the District of Columbia should have the authority to structure its court system in the manner that it believes best serves its residents. However, any incremental costs resulting from a restructuring of the court system must be borne by the District and not by Federal taxpayers. Such costs include any incremental costs to the U.S. Department of Justice.

The Administration will support legislation reflecting these principles.

Sincerely



Howard Paster
Assistant to the President
for Legislative Affairs

The Honorable Eleanor Holmes Norton
Chairwoman
Subcommittee on Judiciary and Education
Committee on the District of Columbia
House of Representatives
Washington, D.C. 20515

The CHAIRMAN. Mr. Bliley?

Mr. BLILEY. Thank you, Mr. Chairman.

This morning we are contemplating the authorization of more than \$16 million over 6 years for the creation of a new D.C. Supreme Court. Proponents claim that a new court is necessary to relieve the workload of the court of appeals, but the court has not experienced a substantial increase in filings since 1986 and it is currently keeping pace with the yearly filings.

Proponents also claim that a new court is needed to shorten the time it takes to complete an appeal. Yet about one-third of the time on appeal is caused by the time it takes the superior court to prepare the record for appeal. H.R. 1633 will do nothing to cure that delay and may succeed only in shifting appellate delay rather than shortening it.

Appropriation

Several weeks ago, the late D.C. Council chairman, John Wilson, appeared before the Appropriations Committee to ask not only for \$38 million over and above the moneys authorized under the Federal payment formula, but for an additional \$26 million to fund the District's existing court system and police and fire departments. This \$26 million won't go for improvements. It is intended simply to keep the judiciary and the departments afloat for another 12 months.

When I suggested last year that the District could not afford to create a new court, my colleague, the Delegate from the District of Columbia, responded that, "The cost of this court would not be totally borne by the District of Columbia until some years out." Well, if this bill had been enacted in 1989 when it was first introduced, we would be in those out-years. But we are still nowhere near a time when the District could afford a new court.

Mr. Chairman, last year the supreme court was forced to cancel most—I mean the superior court was forced to cancel most jury trials during the month of August for lack of funds. Nor could the superior court afford to fill the positions of director of the civil and criminal justice divisions for some months. So too the court of appeals was unable to fill the position of clerk of the court for many months. Financial woes of the existing District of Columbia courts are so great that both the president and the president-elect of the Bar Association warn that the courts have reached a crisis point. Things do not look like they will get better for the District of Columbia judiciary in the immediate future.

Budget Cuts

In fiscal year 1994, the superior court is facing an actual funding cut of 7.1 percent and the court of appeals is facing an actual funding cut of 3.8 percent, even though the District of Columbia spending is supposed to increase overall by 2.8 percent. In total, the District of Columbia judiciary will lose about \$6 million, a bit more than this bill would spend in the first full year of the new court's existence. Worse, according to estimates published the administrative office of the U.S. courts, the first-year start-up costs of a 9-judge appellate court is likely to be about \$2 million more than au-

thorized in this bill. Does it really make sense for us to consider creating a new court when the District is clearly having a hard time paying for the ones it already has?

Last year, I introduced legislation that would give to the victims of violent crime in the District of Columbia the right to appear and be heard at sentencing and parole hearings, and would require that victims receive notification of critical junctures of the judicial process. Corporation counsel for the District testified against these provisions on the grounds that they would "increase the length of judicial proceedings and governmental costs."

Mr. Chairman, how can we tell the survivors of 489 people who were murdered in the District in 1991 or the 214 women who were raped that we cannot afford to give them their day in court but we can afford to spend over \$16 million to help relieve the workload of an appellate court that has not seen a substantial increase in filings since the mid-1980's?

Proponents of H.R. 1633 try to cast it as a tough-on-crime measure. I would have thought that assuring year-round jury trials and fairness to crime victims would constitute more pressing criminal justice concerns. Indeed, I would have thought that simply funding the police department would be a more pressing law enforcement concern for the city.

But putting that aside, it seems to me that adding an additional layer of appeals will simply serve to delay finality in most criminal cases. Mr. Chairman, there is more to be said about whether a new appellate court is needed in the District of Columbia. In a few moments I will offer an amendment that I believe will enable the court of appeals to solve the problems that it faces at far less cost to the taxpayer and without radical change to the current court structure. I will reserve further comment until that time.

In the meantime, I have some materials I would ask unanimous consent to insert in the record, and I would also ask unanimous consent to insert the statement of Congressman Rohrabacher in the record since he could not be here because of attendance at another markup.

The CHAIRMAN. Without objection, the statements will appear in the record.

[The information follows:]

[Editorial]

[From the Washington Post, March 22, 1993]

STOP STIFLING THE DISTRICT'S COURTS

Underfunding the judiciary now means more pain later.

Our local courts—a safety valve of our community—are threatened because of inadequate funding.

The Superior Court, our trial court, was forced to cancel virtually all jury trials last August.

The backlog of untried criminal felony cases in the Superior Court is roughly 3,700.

The average time for disposition of a case in the Court of Appeals has grown to 672 days—roughly 22 months—almost 2½ times the standard set by the American Bar Association.

Evidence of the effects of budget strictures can be found in the hiring freeze that left vacant the positions of Director of the Civil and Criminal Divisions at the Superior Court and two key staff positions, including the clerk of the court, at the Court of Appeals. Similarly, an equipment purchase freeze left unreliable, 10-year-old com-

puter terminals for use in tracking and moving cases along. The Court of Appeals has fallen behind in preserving its own case records for lack of a microfilm machine.

Some of these troubling developments—only a few of many we could cite—were reported by this newspaper. Unfortunately, they have been almost ignored by Mayor Sharon Pratt Kelly and her staff in their recent budget proposals.

Instead, the mayor has recommended that the judicial branch of the District of Columbia government absorb a budget cut of more than 6 percent of its 1993 operating budget when that branch, after years of receiving funding well below its needs, had requested an increase of roughly 7.6 percent. This kind of budget cut has been called a "crises point" by the American Bar Association. We, too, think that it reflects a crisis.

The courts have innovated, trying to do more with less. The Superior Court's Civil Delay Reduction Program has dramatically reduced the time in which the typical civil case is handled (now, most are resolved in less than one year), and the court has just put a similarly promising case management system in place on the criminal side. The Superior Court has strengthened its Multi-Door Dispute resolution program, which offers would-be litigants potentially quicker and cheaper methods of resolving their problems. The Court of Appeals' Case Management Teams have improved processing of the steady and heavy flow of motions that accompany its weighty case load.

This is good news, but it takes support from the other two branches of our local government, not just managerial bravura at the courthouse, to keep the courts working.

The courts of the District of Columbia are not optional agencies. They are linchpins of our government. They play an essential part in preserving order and confidence in the rule of law in the District.

The courts' work touches almost every citizen, whether as juror, witness, litigant, landlord tenant, adoptive parent, divorcee, parolee or otherwise. Their case load is heavy. The civil and juvenile case loads at the Superior Court were the highest per capita in the country in 1990, according to the National Center for State Courts.

Unlike most executive agencies, the courts cannot refuse to hear misdemeanor cases, new appeals or cases in which an interpreter is required. They are duty bound to provide a resolution of all matters that come before them, no matter how the size of their dockets increases.

And that resolution must occur within a reasonable time. It is an old but apt maxim that "justice delayed is justice denied." A child who has been neglected, a victim of domestic violence, a family wrongly facing eviction—their cases cannot sit indefinitely in limbo. That so many felony cases are unresolved and awaiting trial may give prospective defendants comfort, but it should deeply trouble the rest of us.

The courts must hold the promise of resolving in a civilized and timely fashion the disputes that arise between neighbor and neighbor, husband and wife employer and employee, citizen and government. Almost a century ago, the U.S. Supreme Court wrote: "The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government." These words are not too strong to invoke here.

The Mayor's proposed budget for the courts for the new year was apparently cobbled together without regard for these important facts, and, we understand, virtually without discussion with the courts' representatives.

Chief judge Judith W. Rogers of the Court of Appeals, Chief Judge Fred B. Ugast of the Superior Court, Ulysses Hammond (executive officer of the courts), and Mark Tuohey, as president-elect of the Bar, recently testified before the Judiciary Committee of the D.C. council in response the mayor's proposal to make plain that the courts cannot function soundly on the budget that the mayor has requested. The council has in the past shown wisdom and strength in its solid support of the judicial branch, but the courts' budgetary future is now dark.

The mayor and the council and all District taxpayers, in fact, are under acute financial pressure and caught in a terrible budgetary bind. But the courts are not the place to solve the problem. In fiscal year 1993, the entire judicial branch of the District operated on less than 3 percent of the District's overall budget. Cuts that hurt the courts deeply will not go far toward easing the District's financial woes—rather, they promise to sharpen the District's pain later.

The courts cannot plunge into the fray of fiscal bargaining without sacrificing the impartiality that is vital to their role in our system of checks and balances. We must work for them and work to preserve the sense—and that recourse to the courts is meaningful.

When the courts' funding falls below a minimal level, all of us are affected. The foundation of our government weakens. We become more susceptible to unrest and

disorder. This vulnerability may be hard to calculate with precision, but it is too profound to ignore.

Mayor Kelly, council members: Give the courts the funding they need.

[Jamie S. Gorelick is president of the District of Columbia Bar and Mark Tuohy is its president-elect.]

[Editorial]

[From the Washington Times, April 28, 1993]

A SUPREMELY SILLY COURT FOR THE DISTRICT

Today a subcommittee of the House Committee on the District of Columbia convenes to hear testimony on a truly goofy proposal. The idea is that what the District really needs is its very own Supreme Court.

The District currently has a trial court (the Superior Court of the District of Columbia) and an appeals court, whose chief judge is Judith W. Rogers. These courts are, of course, distinct from the federal courts that operate in the District. The D.C. system is structured much in the fashion of the state court system of West Virginia or Delaware.

But that is not quite good enough for Judge Rogers and for D.C. Delegate Eleanor Holmes Norton, who apparently enjoys the backing of Mayor Sharon Pratt Kelly (in part, perhaps, for reasons that will be discussed presently). They want to add a supreme court, turning the D.C. Court of Appeals into an intermediate appellate court. A three-tier system such as this is in place in 34 states, including Virginia and Maryland (though the two-tier system is far more common in states whose populations are about the same as the District's). The federal system also has three tiers. Judge Rogers' idea, which was the subject of hearings in the two previous Congresses as well, is that a supreme court would allow the appeals court to operate more efficiently and that a supreme court sitting together could provide consistent guidance on the law for appellate judges.

All of which sounds high-minded enough. But there is a little more to this than meets the eye.

Who is going to get a seat on the supreme Court of the District of Columbia? Well, if you think Judge Rogers is promoting a system whereby she will be subject to the whims of a court higher than the one over which she now presides, think again. Under this plan, the nine judges of the Appeals Court will become the Supreme Court (the final number will be seven, following the first two retirements), and nine new judges will be hired to fill the intermediate slots.

Oh yes, and Judge (er, Chief Justice) Rogers will be getting a raise, as will all the members of the appeals court now elevated. They currently are paid the same amount of money as federal appeals court judges, \$141,700 a year. The new formula calls for them to be paid at a rate equal to 90 percent of what associate justices of the U.S. Supreme Court make. This takes them to \$143,100.

Now that, as it happens, is a very interesting number. If D.C. is going to have a court system like the one in most states, perhaps it would be a worthwhile exercise to compare compensation for its judges with compensation in other states. Here's what the judges on the highest state courts make in states with populations comparable to the District's: In Delaware, it's \$99,000; Montana, \$64,452; North Dakota, \$71,555; Rhode Island, \$95,149; and Wyoming, \$85,000.

Unfair comparison, you cry? The District has problems different from those of rural, sparsely populated states, and the cost of living is higher! Well, closer to home, how about pay for the top judges in Maryland? It's \$99,000. In Virginia, it's \$99,709. And let's look at states with no shortage of urban centers and crime: Top judges make \$105,000 in Pennsylvania, \$115,000 in New York, and \$121,207 in California. In other words, *currently* D.C. top court judges make nearly \$20,000 a year more than their closest competitor.

Not only that, but the plan Judge Rogers is supporting would make the Supreme Court a court of certiorari, meaning it would decide what cases to take and what cases to skip. So what we are talking about for Judge Rogers and her colleagues is more money, a better title, less work and more interesting work. Not bad.

Meanwhile, we will have to fill those intermediate court vacancies, won't we? As is currently the case, each will be a 15-year appointment made by president Clinton subject to confirmation by the Senate. There is a statutory authority in the district, the D.C. Commission on Judicial Nominations, whose seven members (appointed by the mayor, the city council, the local Bar association, the chief judge of the District

court and the president) must originate recommendations to the president. When there is a vacancy, they review applicants and send three names to the White House for consideration. You would not be wrong to think that Mrs. Kelly and Mrs. Norton are going to be highly influential in deciding who receives these \$141,700 a year, 15-year-minimum jobs. (The compensation can go up, of course, but it can't ever go down.) Do you think Mrs. Norton and Mrs. Kelly will have a hard time coming up with people upon whom to bestow a judgeship?

By the way, this does get a bit expensive. Each judge gets two law clerks (except for the new chief of the intermediate court, who gets three) and a secretary, each paid at grade 11, or \$32,108. So our nine new appeals court judges will cost us about \$240,000 apiece, not counting benefits and office space and office expenses and such. We are talking about a minimum just in salary of more than \$2 million a year.

One other point that may be relevant to Mrs. Kelly's thinking (her corporation counsel is scheduled to testify in favor of the idea). The District is a little strapped for cash, or so its leaders say. Fortunately, this proposal can help. For the first five years, the federal government will pick up the tab.

What could be better?

[The prepared statement of Mr. Rohrabacher follows:]

Hon. Dana Rohrabacher
Statement at D.C. Committee markup
on H.R. 1633, D.C. Supreme Court
June 9, 1993

Mr. Chairman, I have long opposed establishing a D.C. Supreme Court, as among other things, an unwarranted expenditure of federal money.

Therefore, I was pleased to hear that Mrs. Norton will be offering an amendment similar to the one that I was prepared to offer, to remove the federal funds from the bill.

As a result of passing Mrs. Norton's amendment, the bill will be changed from one which adds to the federal deficit into one which establishes an unfunded federal mandate. While this is an improvement from my standpoint, it is not enough to convince me to support this legislation.

It seems to me that it is wrong for this Congress to force the D.C. government to establish and pay for a second level of judicial appeal when they are having such a difficult time financially.

The City Council has never been asked if they would prefer to spend several million dollars per year of their budget on a new Supreme Court or for some other priority. And while the Mayor has endorsed H.R. 1633 as introduced, I don't think we can just assume that she will still support the bill if the city doesn't get any more federal money to pay for it.

Mr. Chairman, while it appears that the federal government is no longer being asked to pay for this court, the city government still has to. Without a clear statement from the Mayor and City Council that they want this court, and that they are willing to take the money from other programs to pay for it, I don't think we should force this legislation down their throats.

Mr. BLILEY. Thank you, Mr. Chairman.

The CHAIRMAN. Are there amendments—well, are there other comments on the bill as introduced, before I recognize the gentle lady from the District?

Mr. SAXTON. Mr. Chairman, I would just like to say that I have an opening statement here that I would like to submit for the record. Essentially, I associate myself with the remarks of the ranking member. I believe that the District certainly has its share of troubles. Financial difficulties are not the least of them, and this, obviously, adding another layer to the court system is going to cost somebody money. We are hard put to know where that is going to come from, as the District is.

So, until we answer those questions, I find it very difficult to support this bill in concept. Thank you.

The CHAIRMAN. I appreciate the gentleman's remarks. Without objection, his prepared statement will appear in the record in its entirety.

[The prepared statement of Mr. Saxton follows:]

CONGRESSMAN JIM SAXTON
OPENING STATEMENT-H.R. 1633
COMMITTEE ON D.C.
JUNE 9, 1993

I concur with Mr. Bliley's statements. In my view the case to establish a D.C. Supreme Court based on the merits of such a change has not been made. I do not believe that a Supreme Court would improve the present D.C. court system.

Furthermore, with the District in severe financial trouble, I cannot support legislation which would only add to that burden.

CONGRESSMAN JIM SAXTON

JUNE 9, 1993

AMENDMENT TO H.R. 1633

Mr. Chairman, I would like to offer an amendment which would create a mandatory by-pass mechanism so that important criminal and constitutional cases would go directly to the D.C. Supreme Court.

While I am not in favor of creation of the Supreme Court for a number of reasons, one of the practical problems I have is that, in my opinion, this change will only slow the judicial process. Adding a third level to the D.C. court system will not oil the wheels of justice -- on the contrary, I believe it will put sand in those wheels.

My amendment would require that the Supreme Court take murder, rape, and substantial drug trafficking cases and cases striking down a statute as contrary to the U.S. Constitution or the Home Rule Act. Many states with a three-tiered court system have a similar mechanism for streamlining the process.

I believe this amendment will ensure that important cases are not bogged-down in an extra layer of appeals.

The CHAIRMAN. Are there other comments?

[No response]

The CHAIRMAN. Hearing none, I would—

Ms. NORTON. Mr. Chairman?

The CHAIRMAN. Ms. Norton, did you have a comment or did you care to be recognized for an amendment?

Ms. NORTON. I have a general comment in answer to points made by the ranking member.

The CHAIRMAN. Please proceed.

Ms. NORTON. I am sympathetic with at least a part of the ranking member's comments. I cast a heavy presumption in against the creation of another layer of bureaucracy in any branch of government, and must say that there was a need to overcome that presumption in order to get me to carry this bill.

I wish to correct the notion that the appeals court is functioning in a way that makes this court unnecessary. In 1988, the court had a 12- to 15-month backlog. Today, it has a 22- to 24-month backlog.

It should be remembered that this is a court that is very efficient. The superior court, for example, has been complimented in editorials in our hometown newspaper, the Washington Post, for the way in which it has used alternatives to the formal legal process in order to speed its processes, and Judge Rogers, when she testified before us, actually had her own efficiencies used against her as she argued for a new court.

Intermediate Court

I remind the committee that three-quarters of the States have a 3-tier court. Many of them have come on line in recent years when it became clear that there was no alternative to a 3-tier court if one was serious about cutting our mounting backlogs. We presented figures at the subcommittee hearing which indicated that those courts which had, indeed, created another layer in recent years had experienced dramatic improvements in efficiency and in processing. We made these cases out very extensively in the subcommittee.

One comment. The gravamen of the ranking member's comments go to expense. Let me say that—and that appears to be his major objection. The ranking member is entirely correct. The District of Columbia cannot afford to set this court up at this time. The District of Columbia, however, deserves to have the structure in place at such time as it does in fact believe it can afford to do so.

Appropriation—Authorization

I have reluctantly amended this bill to remove Federal funds even during a transition period. The argument of the administration and the Justice Department is that if we want a new court we ought to pay for a new court. It is very hard in light of the fact that we pay for our courts already to object to that. My objection is that we have to sit here and talk about this issue at all. Since we do pay for these courts, it ought to be entirely a matter for the District of Columbia to decide whether it needs a new court.

All we are doing and why I ask for the support not only of my colleagues on this side of the podium but on that side is that I

think you can have no objection so long as you are not fiscally implicated. The taxpayers of the United States are not fiscally implicated surely to setting up a structure which allows the District of Columbia to move forward at such time as it believes that it can fund this court.

In the name of home rule, which members on both sides have supported, I ask you to allow the District of Columbia to have this court at its disposal to fund when it gets ready.

The CHAIRMAN. Would the gentlewoman yield to the Chair?

Ms. NORTON. Yes, of course, Mr. Chairman.

The CHAIRMAN. I would like to associate myself with the gentlewoman's remarks. As I am sure my colleagues know, and particularly my colleagues on the minority side, the Chair does believe strongly in home rule. I had urged the gentle lady from the District to remove the authorization. I know that it troubles her not to provide some extra funds for an overcrowded court structure in the District of Columbia. But it seemed to me that in the purest sense if we want the District to govern, to decide what they pay their policemen or their fire people, that ought to be something they decide. Because the law is structured as it is, we must set the salaries. The gentle lady then, I think, raises those salaries but set salaries in a range in which they currently exist, which I gather—if the gentle lady will correct me—the District has agreed to.

We, in effect, are not spending any additional money. We are doing something that under the home rule law we must; that is, creating this structure. They are going to have to do it on a zero-sum basis. They cannot get any new money for it.

I had hoped that these amendments, as they will now be offered, would accomplish that and accommodate both the concerns of my colleagues in the minority in saying that we were not going to spend any extra money. If the District chose to operate in whatever manner they chose to operate, that is in the spirit of home rule.

I want to thank the gentle lady for accommodating the Chair in an attempt to bring this together so that we could have as little disagreement as possible. I just wanted to thank her for going the extra mile, if you will, in accommodating us because I know it goes down hard with folks in the District who feel these are their taxes and this ought to be their decision.

Having said that, I would like to—and I have been waiting 20 years for this opportunity to recognize my senior colleague and neighbor from California in his new position as vice chairman of the District of Columbia Committee. It is good to see you back. Did you have a comment, Mr. Dellums?

Mr. DELLUMS. I have no comment.

The CHAIRMAN. All right. Having said that, I would recognize the gentle lady for her first amendment.

Ms. NORTON. Thank you, Mr. Chairman. I have three amendments to offer at this time.

[Amendment 1 follows:]

AMENDMENT TO H.R. 1633
OFFERED BY MS. NORTON

Page 3, line 11, strike "90 percent of the rate prescribed by law for justices of the United States Supreme Court" and insert "the rate prescribed by law for judges of the United States Court of Appeals".

Page 3, line 13, strike "\$3,000" and insert "\$500".

Page 17, strike lines 24 and 25 and insert the following:

1 (2) Section 11-703(b), D.C. Code, is amended
2 by striking "the rate prescribed by law for judges of
3 the United States courts of appeals." and inserting
4 the following: "a rate equal to the average of the
5 compensation provided for judges of the Supreme
6 Court of the District of Columbia under section 11-
7 603 and the compensation provided for judges of the
8 Superior Court of the District of Columbia under
9 section 11-904(b).".

Page 18, strike lines 13 and 14 (and redesignate the succeeding paragraphs accordingly).

Ms. NORTON. Amendment 1 strikes those passages of the bill that would have increased the salaries of the justices beyond the level that they are currently. May I say, Mr. Chairman, that I inherited that section of the bill. I cannot imagine why there would have been an increase in the salaries of the justices, particularly since they got the very large increase that Federal judges got some years ago. I want to remove that.

In addition, this amendment—and, by the way, I should say that the chief judge agrees with that and I have had no disagreement with that from those who have asked me to sponsor this bill.

In addition this amendment sets the rate of the salaries for the new appellate court justices at a rate equal to the average of the compensation provided for justices of the supreme court under what will be section 11-603 of the District of Columbia Code and the compensation for justices of the D.C. Superior Court under section 11-904(b) of the District of Columbia Code.

That, Mr. Chairman, is my first amendment.

Mr. BALLENGER. Mr. Chairman?

The CHAIRMAN. Mr. Ballenger?

Mr. BALLENGER. I have a substitute for her amendment, if I may.
[The amendment follows:]

Substitute Amendment to Norton Amendment on
Salaries for Judges and Justices
Offered by Mr. Ballenger

Page 3, line 11, strike "justices of the United States Supreme Court" and insert "judges of the United States Court of Appeals".

Page 34, insert after line 15 the following new section (and redesignate the succeeding sections accordingly):

1 SEC. 203. SALARIES FOR JUDGES OF DISTRICT OF COLUM.

2 BIA COURTS.

3 (a) DISTRICT OF COLUMBIA COURT OF APPEALS.—

4 Section 11-703(b), D.C. Code, is amended by striking
5 "the rate prescribed by law for judges of the United States
6 court of appeals" and inserting "95 percent of the rate
7 prescribed under section 11-603 for justices of the Su-
8 preme Court of the District of Columbia".

9 (b) SUPERIOR COURT OF THE DISTRICT OF COLUM.

10 BIA.—Section 11-904(b), D.C. Code, is amended by strik-
11 ing "the rate prescribed by law for judges of the United
12 States district courts" and inserting "95 percent of the
13 rate prescribed under section 11-703 for judges of the
14 District of Columbia Court of Appeals".

1 (c) EFFECTIVE DATE.—The amendments made by
2 this section shall apply to salaries of judges beginning on
3 the later of—

4 (1) the first January 1 that begins after the
5 date of the enactment of this Act; or

6 (2) the expiration of the 90-day period that be-
7 gins on the date of the enactment of this Act.

The CHAIRMAN. The gentleman is recognized.

Mr. BALLENGER. Mr. Chairman—and let me first of all say that as a taxpayer here in the District of Columbia—I am personally involved in whatever happens in the government. I would like to see it as efficient as possible.

My substitute amendment would set the pay of D.C. Supreme Court justices at 90 percent of what Federal circuit justices receive, which would be \$127,350. The salary for a D.C. intermediate court of appeals judges would be 95 percent of what D.C. Supreme Court justices receive, which would be \$121,153. Superior court judges would receive 95 percent of what intermediate court of appeals judges earn, which is \$115,000.

In 1993, the court of appeals judges will be paid \$141,000 annually and superior court judges will be paid \$133,000 annually. In H.R. 1633, a new formula will be implemented raising the pay to 90 percent of what associate justices of the Supreme Court make, \$143,000.

If the District of Columbia is going to have a court system like the one in most States, the judges should be paid like State judges. Here is what the judges on the highest courts make in States with a population similar to the District's: In Delaware, \$99,000; in Montana, \$64,000; North Dakota, \$71,000; Rhode Island, \$95,000; Wyoming, \$85,000. As you can see, the D.C. judges make about \$40,000 more than the highest paid State judges in these examples.

Now, for those who will say this is unfair because the District is not a rural, sparsely populated area and has a higher cost of living, let's look at what the top judges make in the surrounding States: In Virginia, \$99,709; in Maryland, \$99,000. Again, D.C. judges make over \$40,000 more than their State counterparts.

Let's also look at States with many urban centers and crime problems. Top judges in these States are paid: In Pennsylvania, \$105,000; in New York, \$115,000; and in California, \$121,000. California is the closest competitor in salaries, and these judges still make \$20,000 less than their D.C. counterparts.

As a recent editorial in the Post pointed out, the District of Columbia's finances are in alarming shape and out of balance by \$120 million. My amendment will bring some sanity, at least, to one of these areas of legislation; reasonable judicial salaries.

Thank you, Mr. Chairman.

The CHAIRMAN. Is there any discussion on Mr. Ballenger's substitute?

Ms. NORTON. Mr. Chairman?

The CHAIRMAN. Ms. Norton?

Ms. NORTON. It may surprise Mr. Ballenger to know that I am far more sympathetic to his amendment than he might expect. I do want to say to my friend, however, that while we are grateful, actually, that he is a resident of the District, I am sure that he does not, in fact, pay our income taxes. He probably pays North Carolina income taxes.

Mr. BALLENGER. Your property taxes are high enough. [Laughter.]

Ms. NORTON. I certainly would not want to subject you to our income taxes, though.

Mr. BALLENGER. Thank goodness, no.

Ms. NORTON. I think too much of you for that.

I believe that—I don't know how these salaries got to be the same as Federal court salaries. But I am almost inclined to say I told you so. I think that since we have the authority to set these courts up, since these are article I judges, as we are always told, that they were made the equivalent of Federal judges. In my judgment, that was inappropriate and their salaries certainly ought to be set—particularly if we were starting fresh, nobody would think of setting the salaries as they are. For example, our Mayor currently makes \$90,705. Now, our judges work very hard, but I do not think anybody works harder than the people who have to run the cities.

The problem is exacerbated, it seems to me, by what surely has been an unintended consequence. When the judges and the Congress got the large increase in salaries several years ago that would have been the time, it seems to me, to leave these judges at where they were and to begin therefore to put them in line with State judges across the country and in this region.

This is, of course, a high income and high cost-of-living area. But nothing can justify this kind of disparity between judges and other elected officials. I think it unfair, however, to use a bill designed to create a new court to structurally reduce the salary of sitting judges. It looks like a kind of quid pro quo.

I do not think anybody intends here to extract a reduction personally from judges in order to establish a new structure needed by the city. I do not think we can do that. I do think we can begin to look at how we can bring these judges' salaries more in line with what they ought to be. I want you to know that I have said in no uncertain terms to the chief judge of both courts, with whom I have worked, that I believe these salaries are out of line.

I think the challenge to us is to find the way without doing what I think all of us would agree would be unfair, which is to take a sitting judge and to reduce the salary of a sitting judge while that judge is on the bench. I think that would probably be unprecedented in the United States or would not be wise. I think it raises serious problems of comity between the three branches of government, if not constitutional problems.

Mr. BLILEY. Mr. Chairman?

The CHAIRMAN. Mr. Bliley?

Mr. BLILEY. I have a statement I would like to insert in the record.

The CHAIRMAN. Without objection.

[The prepared statement of Mr. Bliley follows:]

**Statement of Rep. Thomas J. Bliley, Jr.
on
Ballenger Substitute to Norton Amendment
to H.R. 1633--Salary
A Bill to Create A Supreme Court
for the District of Columbia
Mark-Up June 9, 1993**

Mr. Chairman, proponents H.R. 1633 assert that creating a supreme court for the nation's capital is necessary in order to put the District's judiciary on par with the majority of the states (38 to be exact). District of Columbia judges however, receive the same compensation as Article III federal judges, based on the theory that the D.C. court system mirrors its Article III counterpart and its judges shoulder a comparable workload. By the terms of this legislation however, the

justices and judges of the District's local judiciary would continue to be compensated at levels commensurate with federal judges, even though its appellate courts would be restructured to resemble state court systems and its workload reduced.

Mr. Chairman, if the District of Columbia wants on one level to be treated like any other state it should accept that treatment at all levels. No state, with or without an intermediate appellate court, compensates its judges at the level the District does. The judges on the D.C. Court of Appeals receive over \$55,000 more each year than the average salary of highest paid judges in the 12 states with no intermediate appellate court, and \$50,000 more than

average salary of the highest paid justices in the states with an intermediate appellate court. A comparison to neighboring jurisdictions further demonstrates the need for this amendment. The District's appellate court judges receive \$41,991 and \$42,700 more than the highest paid judges in Virginia and Maryland respectively.

As Congress passes off the costs of this bill to the District of Columbia, it seems to me that the least that we can do is to save the District every dollar we possibly can.

Mr. Chairman, I urge my colleagues to support fair play for the District's local courts by passing this Ballenger amendment.

Mr. BLILEY. I agree with the gentleman from North Carolina. At a time when they are talking about not having jury trials in August because they do not have enough money to pay jurors these salaries are way out of line. At a time when the city is contemplating going to the bond market to borrow money again to pay for operating expenses, it doesn't make a lot of sense.

I have no doubt that this amendment will be defeated, but nevertheless I in conscience must support it because I just don't think that people are considering just how bad off are the finances of this city. I mean just going ahead and doing it and saying, "Well, you know, it is our money." But you can bet that next year the Mayor will be up here trying to get us to pay for it, just as the late president of the city council asked for it a few weeks ago.

So with that I yield back the balance of my time.

The CHAIRMAN. The Chair appreciates the gentleman's remarks. I can only suggest that the old Chinese proverb of not wishing too hard it may come true is the Mayor may not only come up asking for money. We may end up having to make these decisions ourselves, and that could be your worse dream.

I would like to support the gentle lady's amendment. We must make a decision, as I say, to set salaries. That is the law. The District chooses to set them, as the gentle lady's amendment requires, and while I might very well be sympathetic to Mr. Ballenger's amendment—I think we have great judges in California and maybe we underpay them. But I really do not feel on a procedural basis that is a matter that this committee should be micromanaging. So that I would say, that I would be inclined to vote against the gentleman from North Carolina's amendment.

If there are no other comments, the question would occur on Mr. Ballenger's substitute to the amendment of the gentle lady from the District of Columbia. All those in favor would signify by saying aye.

[A chorus of "aye."]

The CHAIRMAN. Those opposed would signify by saying no.

[A chorus of "no."]

Mr. BALLENGER. Could I have a rollcall?

The CHAIRMAN. You certainly may.

Mr. BALLENGER. Yes, sir.

The CHAIRMAN. The clerk will call the roll.

The CLERK. Mr. Dellums?

Mr. DELLUMS. No.

The CLERK. Mr. Wheat?

The CHAIRMAN. No, by proxy.

The CLERK. Mr. McDermott?

The CHAIRMAN. No, by proxy.

The CLERK. Ms. Norton?

Ms. NORTON. No.

The CLERK. Mr. Lewis?

The CHAIRMAN. No, by proxy.

The CLERK. Mr. Jefferson?

The CHAIRMAN. No, by proxy.

The CLERK. Mr. Bliley?

Mr. BLILEY. Aye.

The CLERK. Mr. Rohrabacher?

Mr. BLILEY. Aye, by proxy.

The CLERK. Mr. Saxton?

Mr. SAXTON. Aye.

The CLERK. Mr. Ballenger?

Mr. BALLENGER. Aye.

The CLERK. Mr. Stark?

The CHAIRMAN. The Chair votes no.

The CLERK. Mr. Chairman, the noes are 7 and the ayes are 3.

The CHAIRMAN. The Chair seems to detect that there were 4 that were proxy aye.

The CLERK. I am sorry. Four.

The CHAIRMAN. The ayes are 4 and the nays are 7, and the substitute is not agreed to.

The vote would recur on the gentlewoman's amendment. All those in favor would signify by saying aye.

[A chorus of "aye."]

The CHAIRMAN. Those opposed, signify by saying no.

In the opinion of the Chair, the ayes have it. I would recognize the gentlewoman from the District for the purpose of explaining her second amendment.

[The amendment follows:]

F:\NLW\DC1\1633AMD.02A

Norton Amendment #2

H.L.C.

(Strike authorization of appropriations)

AMENDMENT TO H.R. 1633**OFFERED BY MS. NORTON**

Page 32, strike line 18 through page 33, line 10
(and redesignate the succeeding section accordingly).

Ms. NORTON. Thank you, Mr. Chairman.

My second amendment strikes the authorizing clause of the bill found on pages 32 and 33. Given the current Federal fiscal crisis, I have reluctantly concluded that we cannot at this time authorize new dollars for this legislation. Therefore, I am offering amendment No. 2 for the purpose of striking the authorizing section.

The CHAIRMAN. Is there any discussion?

Mr. BLILEY. Mr. Chairman?

The CHAIRMAN. Mr. Bliley?

Mr. BLILEY. I ask unanimous consent to insert a statement in the record.

The CHAIRMAN. Without objection.

[The prepared statement of Mr. Bliley follows:]

Statement of Congressman Thomas J. Bliley, Jr.
on the Amendment of Delegate Norton
to strip Federal funding from H.R. 1633

Committee on the District of Columbia
Mark-up on H.R. 1633
June 9, 1993

Mr. Chairman, I greet this amendment with mixed emotions. Certainly, I agree with the Gentlewoman from the District of Columbia that the Federal government should not be charged with bearing the cost of a new Supreme Court for the city. I appreciate the acknowledgement that at a time when we are struggling with new taxes and spending cuts, this is not a priority for federal funding. If the city believes that it needs a new court, it should be willing to pay for it.

Yet, it is troublesome that the federal government will once again be mandating costs for another unit of government when

that local government so clearly cannot afford it. I do not like the federal government passing on unnecessary costs to my state. I do not like the federal government doing that to the District of Columbia either and especially when the costs far outweighs the benefits. As I noted in my opening statement, the city is asking for a total of an additional \$63 million in federal assistance. If my colleagues have followed the Appropriations process, they will realize that \$63 million is probably not going to be provided. So, the District will not receive the money it had counted upon for current services and we will now add an additional financial burden.

Mr. Chairman, I will not repeat here all of the arguments I made earlier or quote again at length the statements from D.C. bar leaders on the financial straits in which the city's judiciary finds itself. Suffice it to say that even if one were unsure

whether H.R. 1633 should be rejected on the merits of the issue, there is no question that the city simply cannot afford it.

For those reasons, Mr. Chairman, while I will join the Delegate from the District in voting for her amendment, I must nevertheless continue to oppose her bill. Congress cannot afford it and the District cannot afford it.

Mr. BLILEY. I will support the lady's amendment. However, I am not very happy in doing it. I constantly do not like the Federal Government mandating on States that they do certain things and not providing the funds to do it, and here we go. We are doing that exactly with this amendment, even though it has the full support of the Delegate.

So I am reluctant. I will support it, but I do think it is not the best policy.

With that I yield back the balance of my time.

Ms. NORTON. Mr. Chairman?

The CHAIRMAN. Ms. Norton?

Ms. NORTON. Could I indicate it is important to correct any sense that this is a mandated structure. The District of Columbia would be free to set the structure up in its own time or never set it up. All we do is authorize the District to do so.

As to the funds, the District pays for its own courts now. It was better policy when you set up an entirely new structure not to put a new cost of that kind. It is not a very large cost, but for a budget of the size of the District the better policy would have been the transition toward the new court in the original bill.

Given the difficulty we have had in getting this bill through, given the fact that the District was going to have to pay for the court in a few years anyway, and given the fact that at least this year no Federal funds are available and that the District pays for its own courts in any case, it seemed important to me to allow the structure to go forward. I would appreciate that being understood as the reason that I have proceeded in this fashion.

The CHAIRMAN. Is there any other discussion?

[No response]

The CHAIRMAN. If not, the question occurs on the motion by the gentlewoman from the District. All those in favor, signify by saying aye.

[A chorus of "aye."]

The CHAIRMAN. Those opposed, signify by saying no.

The ayes have it and the amendment is agreed to.

The gentlewoman from the District is recognized for amendment No. 3.

[The amendment follows:]

AMENDMENT TO H.R. 1633
OFFERED BY MS. NORTON

Page 34, insert after line 15 the following new section (and redesignate the succeeding sections accordingly):

1 **SEC. 203. TREATMENT OF HEARING COMMISSIONERS AS**
2 **JUDICIAL MAGISTRATES.**

3 (a) IN GENERAL.—

4 (1) REDESIGNATION OF TITLE.—Section 11–
5 1732, D.C. Code, is amended—

6 (A) by striking “hearing commissioners”
7 each place it appears in subsection (a), sub-
8 section (b), subsection (d), subsection (i), sub-
9 section (l), and subsection (n) and inserting
10 “judicial magistrates”;

11 (B) by striking “hearing commissioner”
12 each place it appears in subsection (c), sub-
13 section (e), subsection (f), subsection (g), sub-
14 section (h), and subsection (j) and inserting
15 “judicial magistrate”; and

16 (C) by striking “hearing commissioner’s”
17 each place it appears in subsection (e) and sub-
18 section (k) and inserting “judicial mag-
19 istrate’s”. •

2

1 (2) CONFORMING AMENDMENTS.—(A) Section
2 11–1732(c)(3), D.C. Code, is amended by striking “,
3 except that” and all that follows and inserting a pe-
4 riod.

5 (B) Section 16–924, D.C. Code, is amended—
6 (i) by striking “hearing commissioner”
7 each place it appears and inserting “judicial
8 magistrate”; and

9 (ii) in subsection (f), by striking “hearing
10 commissioner’s” and inserting “judicial mag-
11 istrate’s”.

12 (C) Section 16–2308, D.C. Code, is amended by
13 striking “judge” each place it appears and inserting
14 “judicial officer”.

15 (D) Section 16–2312, D.C. Code, is amended—
16 (i) by striking “judge” each place it ap-
17 pears in subsections (c), (d), (e), (f), and (j)
18 and inserting “judicial officer”;

19 (ii) in subsection (c), by striking “He”
20 each place it appears and inserting “The judi-
21 cial officer”;

22 (iii) in subsection (d)(1), by striking “his
23 reasons” and inserting “the reasons” and by
24 striking “he finds” each place it appears and
25 inserting “the judicial officer”;

1 (iv) in subsection (d)(2)(A), by striking
2 “supervise him” and inserting “supervise the
3 child”;

4 (v) in subsection (d)(2)(C), by striking
5 “his protection” and inserting “the child’s pro-
6 tection”;

7 (vi) in subsection (e), by striking “he
8 shall” and inserting “the judicial officer shall”;

9 (vii) in subsection (f), by striking “his rea-
10 sons” and inserting “the reasons”, and by
11 striking “he shall” each place it appears and in-
12 serting “the judicial officer shall”;

13 (viii) by striking “his detention” each place
14 it appears in subsections (h) and (i) and insert-
15 ing “the child’s detention”; and

16 (ix) in subsection (j), by striking “his par-
17 ent” and inserting “the child’s parent”.

18 (3) CLERICAL AMENDMENT.—The item relating
19 to section 11–1732 of the table of sections of chap-
20 ter 17 of title 11, D.C. Code, is amended to read as
21 follows:

“11–1732. Judicial magistrates.”.

22 (4) TRANSITION PROVISION REGARDING HEAR-
23 ING COMMISSIONERS.—Any individual serving as a
24 hearing commissioner under section 11–1732 of the
25 District of Columbia Code as of the date of the en-

1 actment of this Act shall serve the remainder of
2 such individual's term as a judicial magistrate, and
3 may be reappointed as a judicial magistrate in ac-
4 cordance with section 11-1732(d), D.C. Code, except
5 that any individual serving as a hearing commis-
6 sioner as of the date of the enactment of this Act
7 who was appointed as a hearing commissioner prior
8 to the effective date of section 11-1732 of the Dis-
9 trict of Columbia Code shall not be required to be
10 a resident of the District of Columbia to be eligible
11 to be reappointed.

12 (b) EXPANSION OF DUTIES.—Section 11-1732(j),
13 D.C. Code, is amended—

14 (1) in paragraph (4)(A)—

15 (A) by inserting after “involving” the fol-
16 lowing: “the establishment of paternity or”, and

17 (B) by striking “guidelines established by
18 rule of the Superior Court” and inserting “child
19 support guidelines established by the Council of
20 the District of Columbia”;

21 (2) in paragraph (5), by striking “and Family”
22 and inserting “Family, Probate, and Tax”;

23 (3) by redesignating paragraph (5) as para-
24 graph (7); and

1 (4) by inserting after paragraph (4) the fol-
2 lowing new paragraphs:

3 “(5) Conduct detention, neglect, and shelter
4 care proceedings in which a child is alleged to be de-
5 linquent, neglected, or in need of supervision.

6 “(6) Conduct proceedings and issue orders in
7 uncontested probate and fiduciary matters brought
8 under title 20 of the District of Columbia Code.”.

9 (c) ADDITIONAL CONFORMING AMENDMENTS.—(1)
10 Section 11–1732(d), D.C. Code, as amended by subsection
11 (a)(1), is further amended—

12 (A) by striking the period at the end of the first
13 sentence and inserting “, in accordance with stand-
14 ards and procedures established by the Superior
15 Court.”; and

16 (B) by striking the second sentence.

17 (2) Section 11–1732(m), D.C. Code, is amended to
18 read as follows:

19 “(m) The Chief Judge of the Superior Court shall,
20 from time to time, conduct such studies on the utilization
21 of judicial magistrates as the Board of Judges shall deem
22 expedient, taking into account the suggestions of the Dis-
23 trict of Columbia Bar and other interested parties.”.

24 (3) Section 11–1732, D.C. Code, is amended by add-
25 ing at the end the following new subsection:

1 “(p) The Joint Committee on Judicial Administration
2 in the District of Columbia shall determine the rate of
3 compensation for judicial magistrates in accordance with
4 section 11-1726.”.

Page 27, insert after line 9 the following new paragraph (and redesignate the succeeding paragraphs accordingly):

5 (5) Section 11-1726, D.C. Code, is amended—

6 (A) in the first sentence, by striking “Executive Officer” and all that follows and inserting “Joint Committee (upon the recommendation of the Executive Officer) shall fix the rates of compensation of such employees.”; and

7 (B) in the second sentence, by striking “Executive Officer” and inserting “Joint Committee”.

Page 29, insert after line 10 the following new subsection (and redesignate the succeeding subsections accordingly):

15 (g) AMENDMENT TO CHAPTER 21 OF TITLE 11, D.C. CODE.—Section 11-2101(c), D.C. Code, is amended by
16 striking “Superior Court” and all that follows and inserting “Joint Committee on Judicial Administration in the
17
18

7

1 District of Columbia in accordance with section 11-
2 1726.”.

Page 31, insert after line 16 the following new subsection (and redesignate the succeeding subsections accordingly):

3 (k) AMENDMENT TO CHAPTER 5 OF TITLE 21, D.C.
4 CODE.—The first sentence of section 21-502(e), D.C.
5 Code, is amended by striking “in accordance with” and
6 all that follows and inserting “by the Joint Committee on
7 Judicial Administration in the District of Columbia in ac-
8 cordance with section 11-1726.”.

Page 35, line 8, strike “201 and 202” and insert
“201, 202, and 203”.

Ms. NORTON. Thank you, Mr. Chairman. The proposed amendment No. 3 to H.R. 1633 would enable the Superior Court of the District of Columbia to increase its efficiency by more extensive use of judicial officers who now have the title of hearing commissioner. This amendment would grant the commissioners the authority to decide paternity cases and to conduct new family referral hearings without first obtaining the consent of the parties.

The amendment would also extend the jurisdiction of these judicial officers to adjudicate uncontested probate and fiduciary matters without the consent of the parties, and to make findings of fact and enter orders in probate and tax matters subject to the rules of the superior court without the consent of the parties.

The amendment would also change the title of hearing commissioner to judicial magistrate. This new title will more accurately inform the public that these officers are fully empowered to adjudicate disputes. This will enhance the litigants' perception that the court is treating every case with respect and fairness.

Consistent with other sections of the bill, the joint committee would be authorized to set the level of compensation rates for judicial magistrates.

Thank you, Mr. Chairman.

The CHAIRMAN. Is there any discussion on the amendment?

Mr. BLILEY. Mr. Chairman?

The CHAIRMAN. Mr. Bliley?

Mr. BLILEY. I support the Delegate's amendment converting the hearing commissioners to judicial magistrate, while at the same time expanding their jurisdiction. The chief judge of the District's Superior Court has long supported this move as one relatively simple way Congress could help alleviate the superior court's calendar and give increased status to the current hearing commissioners.

I urge all my colleagues to support this amendment. I yield back the balance of my time.

The CHAIRMAN. Is there any other discussion?

[No response]

The CHAIRMAN. If not, the question occurs on amendment by the gentle lady from the District. All in favor, signify by saying aye.

[A chorus of "aye."]

The CHAIRMAN. Those opposed, signify by saying no. The amendment is agreed to.

I would like to if—are there other amendments at this point? Would the gentleman suspend for the Chair, in that I do not have your additional amendment, to allow the Chair to offer a technical amendment to H.R. 1633, which is in your folders?

[The amendment follows:]

AMENDMENT TO H.R. 1633
OFFERED BY MR. STARK

Page 33, line 18, strike "Section" and insert "(a) IN
GENERAL.—Section".

Page 34, insert after line 8 the following:

- 1 (b) EFFECTIVE DATE.—The amendment made by
- 2 subsection (a) shall take effect on the date of the enact-
- 3 ment of this Act.

Page 35, strike lines 6 through 15.

The CHAIRMAN. I would move its adoption. It makes two minor changes: A sentence is inserted on page 34 to make it clear that the effective date of section 201 is the date of enactment of the bill; and second, the severability clause at the end of the bill is deleted as unnecessary and confusing.

Mr. BLILEY. I so move, Mr. Chairman.

The CHAIRMAN. The minority is in agreement. I would ask those in favor to signify by saying aye.

[A chorus of aye.]

The CHAIRMAN. Those opposed, no.

[No response]

The CHAIRMAN. The technical amendment is agreed to. I would at this point recognize Mr. Ballenger.

[The amendment follows:]

AMENDMENT TO H.R. 1633
OFFERED BY MR. BALLENGER

Page 7, strike lines 10 through 19 and insert the following:

1 “(2) with respect to a case or class of cases
2 pending in the District of Columbia Court of Ap-
3 peals during the 3-year period that begins with the
4 effective date of this section, the sound and efficient
5 administration of justice dictates that the case or
6 class of cases be certified for review by the Supreme
7 Court of the District of Columbia.

Page 12, strike line 11 and all that follows through
page 14, line 16, and insert the following:

8 (a) REPORT ON TRANSITION PRIOR TO APPOINT-
9 MENT OF JUSTICES.—

10 (1) IN GENERAL.—A committee consisting of
11 the chief judge of the District of Columbia Court of
12 Appeals together with 2 other judges of such court
13 and the chief judge of the Superior Court of the Dis-
14 trict of Columbia together with 2 other judges of
15 such court shall be responsible for the administra-
16 tion of the period of transition prior to the establish-
17 ment of the Supreme Court of the District of Co-

1 lumbia, including the hiring of necessary staff, the
2 preparation of facilities, and the purchase of nec-
3 essary equipment and supplies.

4 (2) REPORT TO CONGRESS.—Not later than
5 120 days after the date of the enactment of this Act,
6 the committee referred to in paragraph (1) shall
7 submit to the Subcommittee on Government Effi-
8 ciency, Federalism, and the District of Columbia of
9 the Committee on Governmental Affairs of the Sen-
10 ate and the Committee on the District of Columbia
11 of the House of Representatives a transition report,
12 consistent with this Act, regarding the establishment
13 of the Supreme Court of the District of Columbia.

14 (b) INITIAL APPOINTMENT OF JUSTICES OF THE SU-
15 PREME COURT OF THE DISTRICT OF COLUMBIA.—Not
16 later than 6 months after the date of the enactment of
17 this Act, the President shall nominate and appoint the
18 chief justice and the associate justices of the Supreme
19 Court of the District of Columbia in accordance with sec-
20 tion 433 of the District of Columbia Self-Government and
21 Governmental Reorganization Act.

Page 33, line 20, strike "(1) Except as provided in
paragraph (2), the chief justice" and insert "The chief
justice".

Page 34, strike lines 4 through 8.

Mr. BALLENGER. Thank you, Mr. Chairman. My amendment calls for a Presidential appointment of the supreme court justices for the District of Columbia. Currently, the District has a 2-tier judicial system consisting of a superior court and court of appeals, and the D.C. Commission on Judicial Nominations makes recommendations to the President for appointments to this court. Nominees are subject to the confirmation of the U.S. Senate and are appointed for a 15-year term by the President.

Under the bill before us today, all of the current members of the D.C. Court of Appeals would be converted into justices on the supreme court without the Presidential appointment and without Senate confirmation. It concerns me that our committee has taken upon itself the task of appointing the justices of the new supreme court. The former D.C. Court of Appeals justices would have increased powers as justices of the new supreme court. Currently, most appeals cases are resolved by a 3-judge panel. These panels do not have the power to overturn prior court decisions. Only court decisions in which the entire court sits as a whole may do that.

The new supreme court judges would have the power to overturn previous case law in every case that comes before them. From my small businessman's perspective, it looks like this increase in power is fairly significant and would require nomination and reconfirmation.

Finally, Justice Rehnquist was renominated and reconfirmed to be Chief Justice of the United States even though the Chief Justice casts only one vote, just like other Members of the Supreme Court.

I thank you for your consideration, Mr. Chairman.

The CHAIRMAN. The Chair would point out, which is probably obvious, he is not a lawyer. But it seems to me that the gentleman's amendment does not accomplish a great deal. If, in fact, the District merely, instead of elevating, just changed the rules and inserted a middle court, those people would have to be appointed by the President and confirmed. If instead of raising the existing 9-judge panel up a notch we just kind of inserted somebody in the middle, I think you are going to end up the same way. These people have all gone through the appointment process. I am sure that your staff will explain why in the nuance of legal technicalities I am wrong. But I don't really see that you are going to get new members. You are taking one court—if you say you are not, if you are just inserting under them, unless I misunderstand it—

Mr. BALLENGER. I am not a lawyer either.

The CHAIRMAN. Yes, OK. Well.

Mr. BALLENGER. But it does appear to me that we have taken a panel of judges that used to have sit to change a law, and I am not, again, a lawyer. But to change the law they used to have to sit as a complete panel. Now they can do it as individuals, once we bump them up.

[Pause]

Mr. BALLENGER. Oh; OK. They will always sit as a complete panel.

The CHAIRMAN. I understand that there is indeed some technical difference, but the reason the Chair would be inclined to oppose your amendment is that these people have gone through the process and we are, as I would look at it, inserting another court, if you

will, between them. I know that is gilding the lily a little bit because they are getting some additional powers.

But I would be inclined to think that these people have been voted out once, probably appointed by Republican Presidents in some cases and approved even by a Republican-controlled Senate. So that my guess is that if this is the way the District chose to accomplish this change I would be inclined to let them go ahead.

Mr. BLILEY. Mr. Chairman?

The CHAIRMAN. Mr. Bliley?

Mr. BLILEY. Mr. Chairman, I ask unanimous consent again to insert in the record my full statement.

The CHAIRMAN. Without objection.

[The prepared statement of Mr. Bliley follows:]

**Statement of Rep. Thomas J. Bliley, Jr.
on
Ballenger Amendment to H.R. 1633--Pres. Appt.
A Bill to Create A Supreme Court
for the District of Columbia
Mark-Up June 9, 1993**

Mr. Chairman, the amendment offered by the gentleman from North Carolina represents a common sense approach to the appointment of justices to the Supreme Court for the District of Columbia.

H.R. 1633 as written does not simply redefine the job description of the current appeals court judges. Rather, it expands their powers significantly.

Mr. Chairman, this amendment stipulates that the

President nominate and the Senate confirm the judges that are to become justices of the District of Columbia Supreme Court, using the same procedures currently in place for all D.C. judges. Requiring that justices of the new Supreme Court be nominated and confirmed -- rather than decreed by this Committee -- makes good sense. By the terms of H.R. 1633, Supreme Court justices would have the ability to overturn precedent every time they heard a case, a power the current appeals court judges do not enjoy. This expanded power will be given to individuals who have not been renominated and reconfirmed. By comparison, Justice Rehnquist was renominated and reconfirmed in order to become Chief Justice of the Supreme Court of the United States.

Through this legislation the Committee on the District of Columbia will essentially assume the power of judicial appointment. We are choosing the new judges for the new court. Frankly, I do not think we are in a position to do that. In effect, H.R. 1633, as written, usurps the constitutional power of the President and the Senate. The gentleman's amendment restores the rightful authority to the President and the Senate. I urge adoption of this amendment.

Mr. BLILEY. I support the gentleman's amendment. The basic thing is these justices will have expanded powers. As a comparison, when Justice Rehnquist was renominated to be the Chief Justice of the Supreme Court of the United States he had to be reconfirmed. The same should be true here, I mean.

What happens in the future if this is set up? Once these people have been appointed and something happens, one of them retires for one reason or another, will the President appoint them and they be subject to confirmation by the Senate or will they be just appointed by the city with no confirmation by the Senate, while the lower judges will still be appointed by the President and confirmed by the Senate?

The CHAIRMAN. If the gentleman would yield to me for a response?

Mr. BLILEY. I am finished. Go ahead.

The CHAIRMAN. I do not like the idea in the first place that the President appoints the judges. In Virginia and in California we deal with this quite well, thank you, without the President of the United States, whomever that person may be, and without the United States Senate in whatever state of disarray that body may be in. California manages to screw up their own court system quite well all by themselves. I am sure Virginia does the same.

Why we should have the President appointing judges in the District of Columbia at all is a matter that escapes me. Why the Mayor should not do it with the advice and consent of the city council the way it is done in every other independent jurisdiction seems to me to be the basis of home rule.

Now, that is not the law and the Chair does not really want to debate it at this point. As long as it is there, it seems to me it works all right and the District does not mind it. But basically, if we are really going to follow the pure thought of home rule, we ought to just say appoint whomever you want. They are your laws, go ahead and get them.

Mr. BALLENGER. Mr. Chairman?

The CHAIRMAN. Mr. Ballenger?

Mr. BALLENGER. The only thing that comes to my mind is all we are doing is setting up a structure now for the future sometime. So in reality, anybody that is nominated at the present time may be nominated for the supreme court—you do not know—because we are going to bump them all up somewhere whenever they can afford it.

So what I would say, and my point, I think, still applies, and the fact that we are not actually doing this at the present time. We are setting up a structure that will perform in the future, and because of that any nomination that comes up at the present time could very well be to the supreme court.

The CHAIRMAN. The Chair is not in a position to evaluate the efficacy of the whole procedure except to suggest that—hewing to the line is, perhaps, an easy way out. But I guess I just figure it is their District and they ought to be able to deal it with as they choose.

Mr. SAXTON. Mr. Chairman, may I ask a question?

The CHAIRMAN. Mr. Saxton? Sure.

Mr. SAXTON. I am confused. It seems to me that what we are doing here in creating this new level, this new court system, the

President, I do not believe, under the language of the bill is going to make these appointments.

The CHAIRMAN. No.

Mr. SAXTON. We are elevating judges to a new level, if I am not mistaken.

The CHAIRMAN. But also creating some new judges slots that will come in under these and they will have to go through the process of—

Mr. SAXTON. But the President is not going to appoint these supreme court judges.

The CHAIRMAN. No.

Mr. SAXTON. They are being elevated. Essentially, we are.

The CHAIRMAN. The gentleman is correct.

Ms. NORTON. Mr. Chairman?

The CHAIRMAN. Ms. Norton? Now that I have loused up your argument, are you prepared to set it straight?

Ms. NORTON. No. On the contrary, Mr. Chairman. I want to associate myself with your remarks.

It is interesting to see a kind of almost Pavlovian reaction to support Presidential power to appoint local judges. Do people really realize we are talking about judges that sit on, for example, small civil and criminal cases of the kind your own judges do? It should not bother this Congress. Whether it is a Republican President or a Democratic President, I would hope he would have better things to do than sit around appointing judges.

I want to say for the record that I, for one, am not invested in the current judges who sit on the Appeals Court of the District of Columbia. I do not know most of them. The President will get to make a whole flock of appointments to this intermediate court.

The CHAIRMAN. If the gentle lady would yield, I would just like to make a statement for the record. That the Chair has a daughter and a son-in-law who are both practicing attorneys in California who might—do not make this much money and might very well be candidates. I had never thought of that. But I just want to—whoever is going to make these choices ought to know that.

I yield back. [Laughter]

Ms. NORTON. For all of those who keep track of local patronage, this is not one of them. [Laughter.]

The bill, of course, if we look at what were the possible options where the President would have to appoint either all of these judges of the intermediate court and the supreme court, I mean what do you do? You have sitting judges. If you had said that the sitting judges shall become the intermediate court, and you think about it, that is probably quite irrational. If you are going to set up a high court, then surely you would want those who are most familiar with the court system to start that court. I think that is the only thinking that was going on here.

I ought to say for the record that I have found Judge Judy Rogers to be utterly professional in the way she has handled this matter and do not detect in her any notion for personal aggrandizement. Rather, as we think of the ways to do it, we are not going to be able to wipe out these bodies, these people who sit on this court. So, we would have to do something with them. The President might reconfirm them, if you like bureaucracy, if you like to give

him more work or the President might put them on the intermediate court, which also does not seem to make a lot of sense, and put new judges on the supreme court. So when you get down to your possible options, this is probably the most rational one. I ask therefore that we approve the bill with that option in it.

Thank you, Mr. Chairman.

The CHAIRMAN. If there is no other discussion, the question is on the amendment of the gentleman from North Carolina. All those in favor, signify by saying aye.

[A chorus of "aye."]

The CHAIRMAN. Those opposed, signify by saying no.

[A chorus of "no."]

Mr. BALLENGER. Could we ask for a rollcall on that one, sir?

The CHAIRMAN. Those in favor of a rollcall will indicate by raising their hands.

[A show of hands.]

The CHAIRMAN. A sufficient number. The clerk will call the roll.

The CLERK. Mr. Dellums?

Mr. DELLUMS. No.

The CLERK. Mr. Wheat?

The CHAIRMAN. No, by proxy.

The CLERK. Mr. McDermott?

The CHAIRMAN. No, by proxy.

The CLERK. Ms. Norton?

Ms. NORTON. No.

The CLERK. Mr. Lewis?

The CHAIRMAN. No, by proxy.

The CLERK. Mr. Jefferson?

The CHAIRMAN. No, by proxy.

The CLERK. Mr. Bliley?

Mr. BLILEY. Aye.

The CLERK. Mr. Rohrabacher?

Mr. BLILEY. Aye, by proxy.

The CLERK. Mr. Saxton?

Mr. SAXTON. Aye.

The CLERK. Mr. Ballenger?

Mr. BALLENGER. Aye.

The CLERK. Mr. Stark?

The CHAIRMAN. No.

The CLERK. Mr. Chairman, the votes are aye, 4; nay, 7.

The CHAIRMAN. The amendment is not agreed to. Are there further amendments?

Mr. SAXTON. Mr. Chairman, I have an amendment at the desk which I ask be considered as read.

[The amendment follows:]

AMENDMENT TO H.R. 1633
OFFERED BY MR. SAXTON

Page 6, insert after line 16 the following new subsection (and redesignate the succeeding subsections accordingly):

1 “(a)(1) If any party aggrieved by a decision of the
2 Superior Court of the District of Columbia with respect
3 to a case (or class of cases) files a petition described in
4 paragraph (2) with the Supreme Court requesting that the
5 Supreme Court review the case (or class of cases), the Su-
6 preme Court shall have jurisdiction over the case (or class
7 of cases) for all purposes, notwithstanding that no appeal
8 with respect to the case (or class of cases) has been taken
9 to or filed with the District of Columbia Court of Appeals.

10 “(2) A petition described in this paragraph is a
11 petition—

12 “(A) for an appeal from a criminal conviction
13 the maximum sentence for which is life imprison-
14 ment or for which there is a mandatory minimum
15 sentence of not less than 10 years imprisonment; or

16 “(B) based on an allegation that an act of the
17 Council of the District of Columbia is invalid be-
18 cause it is in violation of a provision of the Con-

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H.L.C.

(Bypass Ct. of Appeals for certain cases)

2

- 1 stitution of the United States or the District Char-
2 ter.

Page 7, line 3, strike "Such certification may be made" and insert "Certification may be made under subsection (b)".

The CHAIRMAN. The gentleman from New Jersey is recognized to explain his amendment.

Mr. SAXTON. Mr. Chairman, I would like to offer an amendment which would create a mandatory bypass mechanism so that important criminal cases and constitutional cases would go directly to the supreme court. I make this amendment because, as I had said earlier, I have serious reservations about the creation of this new level of court in the District of Columbia. However, if we are going to create this new level of court, it seems to me that we ought to take every precaution to see that it solves one of the basic problems that the court system here has. That is a tremendously long backlog.

I am told that the backlog here is somewhere between 18 and 24 months. Depending on who you talk to, I am sure the length could be different in terms of time. But there are over or at least in the neighborhood of 2,000 cases which are in the backlog and still pending. In my view, just adding a third level to the D.C. court system will not necessarily solve that problem.

Under the current language of the bill, the court, in my understanding, would have essentially three tasks: One would be to hear appeals; a second would be to strike down a statute which is contrary to the United States Constitution or to the Home Rule Act; and the third function would be to choose certain other cases which the supreme court would choose to deal with. This amendment would say that all murder cases, all rape cases and substantial drug trafficking cases where there is a penalty in excess of 10 years or more would be referred directly to the supreme court, and in this way would enable the backlog to be dealt with in a much more efficient manner.

So, I believe this amendment will ensure that these important cases are not bogged down in the extra layer and will ensure that the taxpayers of the District of Columbia and of the country, who inexorably will be asked to help support this new level in the court system, in order that those tax dollars will be spent in the most efficient manner possible.

Thank you.

The CHAIRMAN. Is there anyone who wishes to be heard on the amendment?

Mr. BLILEY. Mr. Chairman?

The CHAIRMAN. Mr. Bliley?

Mr. BLILEY. I think it makes eminent sense. I ask unanimous consent to revise and extend my remarks in support of the amendment.

The CHAIRMAN. Without objection.

[The prepared statement of Mr. Bliley follows:]

**Statement of Rep. Thomas J. Bliley, Jr.
on
Saxton Amendment to H.R. 1633--Bypass
A Bill to Create A Supreme Court
for the District of Columbia
Mark-Up June 9, 1993**

Mr. Chairman, the amendment offered by the gentleman from New Jersey is non-controversial and would speed up the appeal process in the three tier judicial system that proponents of this bill want.

Simply put, if an appeal is filed following a decision from the Superior Court this amendment would take the two most serious, controversial, and likely to be appealed types of cases directly from the trial court to the new Supreme Court, bypassing the intermediate court of

appeals. Specifically, an appeal for a crime carrying a maximum penalty of life imprisonment or a mandatory minimum penalty of ten years would go directly to the District's new Supreme Court. Similarly, those cases challenging the validity of a D.C. Council act under either the Constitution or the Home Rule Charter also would bypass the intermediate appellate stage and go directly to the local supreme court. This amendment has real potential for reducing the judicial workload. Without it, the bulk of the cases will simply continue to spill out at the intermediary level.

Mr. Chairman, while I do not think any of the traditional justifications for expanding the District of

Columbia's judiciary are particularly valid, this amendment, like many of the other Republican amendments that will be offered today, represents one way we can improve this legislation. I urge adoption of the amendment.

The CHAIRMAN. Is there anyone else?

[No response]

The CHAIRMAN. The Chair is inclined to oppose the amendment only because I really am incompetent at this point to judge whether the gentleman's amendment is worthwhile or would lead to efficient determination of justice. I would be happy to hear from the District. It seems to me we have—this really has not been before us. I am not sure that the District has had a chance to testify on this or suggest alternative methods for unjamming the backlog. As I say, I, without prejudice, would be inclined to oppose the gentleman's amendment.

I would yield to the gentleman for any comment he cares to make.

Mr. SAXTON. I appreciate your point. I would just say this by way of clarification.

The United States Justice Department for a long time has opposed the creation of this new level of judicial decisionmaking in the District of Columbia. They have done so because they believe that this will only add a new level of appeal in the District which they view as unnecessary. So, if the courts here become bogged down because there is a new level of appeal, it seems to me that makes the situation worse in terms of the backlog and in terms of cost; not better.

So, what we are saying here is that we are defining the role more specifically of this supreme court, so that they would deal with those crimes that are of the most serious nature. It makes eminent sense to me for us to make this type of definition in terms of their function.

The CHAIRMAN. If the gentleman would yield, I am in no position to debate this point. It does sound to me like the prosecutors would like this amendment, and if I were a defendant I would not. But somewhere in between I am sure is the proper—evidently justice postponed is justice denied, and it depends on whose trying to postpone the case. Again, I am just reluctant at this point to make that decision and on that basis would oppose the amendment.

Mr. SAXTON. If I could just ask one other favor of the Chair, that is to just listen to this argument. This is an issue which I believe needs to be addressed. In the absence of my amendment it does not become an issue that will be addressed. It will only be addressed because we are bringing the issue up today. Absent the passage of my amendment, I believe it will slip back into the situation where it is not an issue.

So, this is the first step in a long process. It has to pass the committee here today. Subsequently, we all know, it has to pass a vote on the House floor after debate in the Rules Committee and in other places. Then it has to pass in the other house. It seems to me, once again, that this is the most efficient way to go, and by approving this amendment today we make it an issue that must be discussed in the various steps along the way. We can make a determination therefore as to whether or not this is a good idea.

Absent my amendment, I believe that it will not be an issue; will not be discussed; and therefore, we will just proceed along in what I believe is a very inefficient manner in drafting this legislation.

Ms. NORTON. Mr. Chairman?

The CHAIRMAN. If the gentle lady would withhold for just a moment. The gentleman's concern is that the issue will get lost if it is not addressed at this point. Does the gentleman agree that it would be the procedure for solving the problem that the gentleman perceives would best be decided by the members of the court and the local bar? What the gentleman wants to see is these cases dispensed with in an expeditious manner. That is the principal issue; am I not correct?

I have an idea, but before I propound it let me recognize the gentle lady from the District for her comments.

Ms. NORTON. Thank you, Mr. Chairman. First, let me say that Mr. Saxton indicated the position of the Justice Department incorrectly. That is not the position of the Justice Department today. I have inserted into the record their position, essentially that the District of Columbia should be allowed to go forward with its court in its own discretion.

Second, the amendment is unnecessary. It is unthinkable, absolutely unthinkable for anyone who is familiar with the way courts operate that a murder, rape or a substantial drug trafficking case or any other case striking down a statute as contrary to the Constitution or the Home Rule Act would not in fact be taken immediately by the supreme court, which is precisely what we want that court to be able to do.

Today, of course, that case has to go to this other layer of court. That case would come out and go to the supreme court because, precisely because that case striking down a statute of the District, of the court would necessarily raise unavoidable statutory policy questions. You can see what the effect would be.

If you allowed—if you did not take that case out, then, of course, you would have other cases stopped up below waiting to see whether murder, rapes, substantial drug trafficking prosecutions then being brought could continue to be brought. So, as a matter of the way courts operate, it is unnecessary to micromanage, given what the purpose of the supreme court is and given that judges simply could not fail to decide that case using the supreme court mechanism unless there were a technical reason why they could not use the supreme court mechanism. I cannot think of one at the moment. So it is unnecessary.

Moreover, if I may say so, we had a very extensive hearing at the subcommittee level. This matter certainly at markup should not be put before this committee where the judges and those responsible for the administration of the courts in the District of Columbia have had no opportunity to even know of this amendment much less respond to them. So far from it being the responsible thing to do, it is irresponsible to put forth an amendment of this kind without hearing from those who are most in a position to know about it and comment on it.

Finally, if there is concern still about what I assure you is inherent in the way a 3-tier court system operates, then I would be willing to work with Mr. Saxton on report language that might be acceptable to guide the court in our thinking. I certainly am sympathetic, to say the very least, with the notion that we would not want any substantial criminal statute struck down and not have

the supreme court take it up and deal with it immediately. So, I do not think that there is any disagreement on that score.

Since I do believe it is inherent in what we are doing; since I have not heard from the chief judge, from the judges, from those who ought to have an opportunity to respond, I must oppose this amendment as an amendment to the bill itself.

Mr. SAXTON. Will the gentle lady yield?

Ms. NORTON. Yes, sir.

Mr. SAXTON. I do not want to prolong this debate. It is obvious that, you know, what happened to other amendments is probably going to happen to this one as well. But I would just make one final point.

One of the problems with law enforcement in this city, and many other cities—I did not pick out this city, many other cities and non-cities or suburban areas around the country is that people who would commit crimes know that they get picked up by the police officer. That they are taken to the station—I have seen it happen—they are booked, they are charged with a crime, and they are then put right back out on the street. They know that it is going to be years, in this case 1½ to 2 years, before they are going to have to deal with the courts. That is bad.

It is bad because people know that when they get picked up it is a relatively easy procedure to get back out and continue the same activities that they were arrested for. So, our function here above all else is to be fair to people, number one. This does not in any way denigrate the fairness of the system beyond what it is already—the level of fairness is not denigrated in any way, in my opinion, by this amendment. Second, it helps to achieve our primary objective of decreasing this backlog, so that when people are arrested, go to the police station, are booked, they know they are going to have to deal with the consequences of their crime at an earlier date. That is important. Ask any police officer. I have. Go on a drug raid, see how disgusted the police are going out and rounding up 20 or 30 or 40 or 50 people, handcuffing them, put them in a paddy wagon, take them down to the station, book them. They look at me and they say, Congressman, they are going to be right back out on the street doing the same activity all over again.

Ms. NORTON. Would the gentleman yield?

Mr. SAXTON. It is your time. You can reclaim it, if you wish.

Ms. NORTON. Could I reclaim it to ask a question? You are not suggesting that every case of this kind ought to be taken by the supreme court?

Mr. SAXTON. No, ma'am. I am suggesting—if the gentle lady will yield, I am suggesting that by taking these serious crimes and dealing with them at the supreme court level that it will free up the lower courts to handle other crimes in a much more expeditious fashion.

Ms. NORTON. Many of these cases should not go to the supreme court at all. I am suggesting that unless a case raises a constitutional problem or a problem related to our home rule charter—

Mr. SAXTON. OK. Well, you and I have a difference of opinion. My amendment says that all murder cases, all rape cases, and all drug trafficking cases which would have imposed a sentence of 10

years or more would be referred directly to the supreme court. Other cases would continue to be handled by the lower courts.

Again, I will not prolong this debate. I just wanted to make that final point. I think it is an important point, and I think it should be addressed by this committee.

Incidentally, there was a subcommittee hearing. It was not a subcommittee markup where this amendment could have been offered. Mr. Chairman, I rest my case.

The CHAIRMAN. Does the gentleman from California wish to be heard?

Mr. DELLUMS. Thank you very much, Mr. Chairman. I have tried to listen very carefully to the author of the amendment, the Chair of the committee and the Representative of the District of Columbia, and having done so I would like to suggest to my distinguished colleague who authored the amendment a procedural approach. That is (a) to withdraw this amendment at this particular time, because the gentleman has argued that what he is attempting to do is to put the issue before the body. At this point it seems to me what is being said by the Chair and the gentlewoman from the District of Columbia from two different perspectives is—the Chair is saying that he, and I am in that position, I am not an attorney, and I try to be a responsible Member of Congress. We are conducting significant business here. It seems to me we ought to be in a position to evaluate the efficacy of the gentleman's amendment. The only way we can do that is to rely upon expert testimony. Apparently that has not taken place anywhere along the process.

So I would suggest to my colleague that (a) withdraw the amendment; (b) reconvene at least one hearing for the purposes of allowing the judges to determine whether or not the amendment from the gentleman makes sense or not. If the judges would state unequivocally, as the gentlewoman has pointed out, that there is no need for the amendment, that the amendment is redundant and unnecessary, then we have the basis for that information. If the judges say that there is some benefit from the gentleman's amendment, then my colleagues could decide in an amendment on the floor, as you point out, could be offered and could be debated in that fashion.

I would conclude by saying the reason why I offer this procedural approach is that the gentleman feels very strongly and has articulately laid out his concern. The question in this gentleman's mind is whether or not your amendment addresses in any efficient and effective way what it is you are trying to do. It would seem to me that as reasonable people here we ought to be willing to take action based upon intelligent information, and it is obvious that there is a tremendous gap, because we have no basis upon which we can effectively evaluate the efficacy of the gentleman's amendment.

It would seem to me in that atmosphere it would be reasonable to withdraw the amendment, get information somewhere down the road. The gentleman, as was pointed out earlier, could impact the process down the road.

Mr. SAXTON. Mr. Chairman, if I may be recognized to respond to the gentleman.

Mr. DELLUMS. Just a thought.

Mr. SAXTON. As I pointed out, my primary concern here is to make sure that we look at this issue, and I share with the gentleman his desire to stimulate debate on it, and so may I suggest that I might be inclined to——

Mr. DELLUMS. Because the gentlewoman—if I might point out, the gentlewoman said she is willing to work with you in this area.

Mr. SAXTON. I would just say to the gentleman that I would be inclined to go along with the gentleman's suggestion if we had an agreement that we could get a rule that would permit discussion of this issue on the floor. If the gentle lady and the chairman would agree to support my effort to go to the Rules Committee and obtain a rule that would permit this discussion on the floor, I would be delighted——

Ms. NORTON. Mr. Chairman, could I have the opportunity before we bargain on a rule here in the authorizing committee——

The CHAIRMAN. If the Chair could be recognized, it has never been the Chair's concern that this committee take bills to the floor under closed rules. There can be, in fact—I can understand circumstances under which we may choose to do so, but I have heard nothing so far this morning that would indicate to me that I would be inclined to want to ask the Rules Committee for a closed rule.

I am not sure that I think we want 5 hours of debate on the momentous legislative decisions that we are making today. But the last thing the Chair would attempt to do in any way is foreclose the gentleman's ability to work his will in the legislative process.

Now, the committee again could work its will, but I just wanted to suggest that.

Mr. DELLUMS. Mr. Chairman, may I make one last comment?

The CHAIRMAN. The gentleman from California?

Mr. DELLUMS. What I am simply saying is that the testimony might discourage the gentleman from his amendment, assuming that the gentleman is open on the issue, and it may encourage the gentleman. But I am saying at this point none of us here have appropriate information.

But absent that approach, this gentleman would be inclined to follow the lead of the gentlewoman from the District of Columbia who believes that the amendment at this particular moment is unnecessary. I am saying that you open up the process and the possibility—unless the gentleman just wants to make the point.

The CHAIRMAN. If there is no further discussion——

Mr. SAXTON. Mr. Chairman, I do not wish to withdraw my amendment at this time.

The CHAIRMAN. The previous question has been moved. The question recurs on the amendment by the gentleman from New Jersey. All those in favor would signify by saying aye.

[A chorus of "aye."]

The CHAIRMAN. Those opposed, signify by saying no.

[A chorus of "no."]

The CHAIRMAN. In the opinion of the Chair, the noes have it.

Mr. SAXTON. Mr. Chairman, may we have a rollcall vote?

The CHAIRMAN. The gentleman requests a rollcall vote. Those in favor of a rollcall vote will raise their hands.

[A show of hands.]

The CHAIRMAN. Evidently a sufficient number. The clerk will call the roll.

The CLERK. Mr. Dellums?

Mr. DELLUMS. No.

The CLERK. Mr. Wheat?

The CHAIRMAN. No, by proxy.

The CLERK. Mr. McDermott?

The CHAIRMAN. No, by proxy.

The CLERK. Ms. Norton?

Ms. NORTON. No.

The CLERK. Mr. Lewis?

The CHAIRMAN. No, by proxy.

The CLERK. Mr. Jefferson?

The CHAIRMAN. No, by proxy.

The CLERK. Mr. Bliley?

Mr. BLILEY. Aye.

The CLERK. Mr. Rohrabacher?

Mr. BLILEY. Aye, by proxy.

The CLERK. Mr. Saxton?

Mr. SAXTON. Aye.

The CLERK. Mr. Ballenger?

Mr. BALLENGER. Aye.

The CLERK. Mr. Stark?

The CHAIRMAN. Pass.

The CLERK. Mr. Chair, the vote is 4 aye, 6 nay, 1 present.

The CHAIRMAN. The motion is not agreed to.

Are there further amendments?

Mr. BLILEY. Mr. Chairman?

The CHAIRMAN. Mr. Bliley?

Mr. BLILEY. I have an amendment at the desk, and I ask unanimous consent that it be considered as read.

The CHAIRMAN. Without objection.

[The prepared statement of Mr. Bliley follows:]

Statement of
Congressman Thomas J. Bliley, Jr.
on Substitute Amendment to Title I of H.R. 1633
June 9, 1993

Mr. Chairman, I offer a substitute amendment to Title I of this bill. My amendment is simple: it will temporarily expand the size of the Court of Appeals by adding two additional judges for a period of five years. After the fifth year, the court would return to its current size through attrition. Also, at the close of the five year period, the General Accounting Office would issue a comprehensive report assessing the continuing need, if any, for structural change to the D.C. judiciary.

Proponents of this bill claim that it is necessary

to cope with appellate caseload and to reduce the time it takes to complete appeals. This amendment provides a far less expensive means of solving both of those problems.

Concerning the issue of caseload, Court of Appeals filings have fluctuated between 1500 and 1700 since 1986. The Court has been successful in disposing of the cases which it receives each year. It has, however, inherited a backlog from the late 1970s and early 1980s when it experienced a sharp increase in filings. A temporary increase in the size of the Court would allow it to reduce that backlog within a few years without the need for establishing a new court or the net seven new permanent

judgeships and their accompanying clerical positions, law clerks, and overhead costs that would go along with it.

Similarly, Mr. Chairman, a temporary increase in the size of the court would allow for a reduction in the time it takes to complete appeals. The causes of delay in the appellate court are universally admitted to be three-fold: an inordinate 200-plus day delay in preparing trial transcripts and records; laxity in holding attorneys to tight briefing schedules -- currently attorneys take more than three times the ABA standard to complete appellate briefing; and laxity in completing oral argument -- again, taking more than twice the ABA standard to reach the oral

argument stage after briefing is completed. The standard response to this complaint is that there is no point in enforcing tight schedules when the cases would only pile-up on the desks of the judges awaiting a decision. A temporary increase in the size of the court would take care of that problem. Cases would not get backlogged at the decision stage because there would be more judges to decide them.

Mr. Chairman, this amendment is a no-lose proposition for the District of Columbia, the judiciary, and the taxpayer. It simply says that we will try a more limited, narrowly tailored solution to the problem of appellate backlog and delay before embarking upon a grandiose and expensive

restructuring of the system. If this solution doesn't work, then the case for more far-reaching reform is bolstered. If it does work, then the taxpayers are spared additional costs and litigants in the District of Columbia will receive the benefit of an efficient two-tier judiciary. In any event, the GAO study called-for in this amendment would provide an objective, third-party assessment of whether further reform is necessary.

I hope that my colleagues in both parties will join in supporting this commonsense and frugal solution to the problems of appellate backlog and delay in the District of Columbia.

Thank you.

[The amendment offered by Mr Bliley to H.R. 1633 follows:]

AMENDMENT TO H.R. 1633

OFFERED BY MR. BLILEY

Strike page 1, line 3 and all that follows through
page 33, line 14, and insert the following:

1 SECTION 1. SHORT TITLE.

2 This Act may be cited as the "District of Columbia
3 Judicial Expansion Act of 1993".

4 TITLE I—DISTRICT OF
5 COLUMBIA COURT OF APPEALS

6 SEC. 101. TEMPORARY EXPANSION OF DISTRICT OF COLUM-
7 BIA COURT OF APPEALS.

8 (a) IN GENERAL.—Section 11-702, D.C. Code, is
9 amended—

10 (1) by striking "The court" and inserting "(a)
11 Except as provided in subsection (b), the court";
12 and

13 (2) by adding at the end the following new sub-
14 section:

15 "(b) During the 5-year period that begins on the date
16 of the enactment of the District of Columbia Judicial Ex-
17 pansion Act of 1993, the court shall consist of a chief
18 judge and 10 associate judges. After the expiration of such
19 period, the court shall revert to its previous size through
20 attrition."

(b) TEMPORARY SUSPENSION OF FILLING VACANCIES.—Section 433 of the District of Columbia Self-Government and Governmental Reorganization Act is amended—

(1) in the second sentence of subsection (c), by striking “If a declaration” and inserting “Except as provided in subsection (d), if a declaration”; and

(2) by adding at the end the following new subsection:

“(d) Notwithstanding subsection (c), no vacancy in the District of Columbia Court of Appeals shall be filled after the expiration of the 5-year period that begins on the date of the enactment of the District of Columbia Judicial Expansion Act of 1993 to the extent necessary to enable the Court to revert to its previous size through attrition pursuant to section 11-702(b), District of Columbia Code.”.

SEC. 102. STUDY ON NEED FOR PERMANENT STRUCTURAL CHANGE TO COURTS OF DISTRICT OF COLUMBIA.

(a) STUDY.—The Comptroller General shall conduct a study of the need for making permanent changes to the organization and structure of the judicial system of the District of Columbia, including the need for the establish-

1 ment of an additional level of appellate courts. In conduct-
2 ing the study, the Comptroller General shall—

3 (1) analyze trends in population and commer-
4 cial activity in the District of Columbia and their ef-
5 fect on the courts of the District of Columbia;

6 (2) analyze trends in the workload of judges in
7 the District;

8 (3) determine the extent of conflict among deci-
9 sions on identical or similar questions of law;

10 (4) address whether more efficient means exist
11 for transferring cases from the trial to appellate
12 level;

13 (5) analyze the need for an expanded capacity
14 for hearing cases en banc, taking into account the
15 cases in the system which would have been heard by
16 a Supreme Court of the District of Columbia;

17 (6) analyze the extent to which case manage-
18 ment would reduce delay in obtaining decisions at
19 the appellate level;

20 (7) address whether changes other than the es-
21 tablishment of an additional level of appellate court
22 would result in a more efficient management of the
23 resources of the judicial system; and

1 (8) analyze the actual costs that would be in-
2 curred in establishing an additional level of appellate
3 court.

4 (b) REPORT.—Not later than 5 years after the date
5 of the enactment of this Act, the Comptroller General shall
6 submit a report to Congress on the study conducted under
7 subsection (a).

F:\NLW\DC2\1633AMD.05A
(Substitute for title I; no additional authorization)

H.L.C.

5

Amend the title so as to read: "A bill to increase the number of judges of the courts of the District of Columbia, and for other purposes.".

The CHAIRMAN. The gentleman is recognized to explain his amendment.

Mr. BLILEY. Mr. Chairman, I am offering a substitute amendment to Title I of this bill. My amendment is simple. It will temporarily expand the size of the court of appeals by adding 2 additional judges for a period of 5 years. After the fifth year, the court would return to its current size through attrition.

Also at the close of the 5-year period the General Accounting Office would issue a comprehensive report assessing the continuing need, if any, for structural change to the D.C. judiciary.

Proponents of this bill claim that it is necessary to cope with the appellate case load and to reduce the time it takes to complete appeals. This amendment provides a far less expensive means of solving both of those problems.

Concerning the issue of case load, court of appeals' filings have fluctuated between 1,500 and 1,700 since 1986. The court has been successful in disposing of the cases which it receives each year. It has, however, inherited a backlog from the late 1970's and early 1980's when it experienced a sharp increase in filings. A temporary increase in the size of the court would allow it to reduce that backlog within a few years without the need for establishing a new court or the net seven new permanent judgeships and their accompanying clerical positions, law clerks and overhead costs that would go along with it.

Similarly, Mr. Chairman, a temporary increase in the size of the court would allow for a reduction in the time it takes to complete appeals. Causes of delay in the appellate court are universally admitted to be threefold: an inordinate 200-plus-day delay in preparing trial transcripts and records; laxity in holding attorneys to tight briefing schedules—currently, attorneys take more than 3 times the ABA standard to complete appellate briefings; and laxity in completing oral arguments—again, taking more than twice the ABA standard to reach the oral argument stage after briefing is completed.

The standard response to this complaint is that there is no point in enforcing a tight schedule when the cases would only pile up on the desks of the judges awaiting a decision. A temporary increase in the size of the court would take care of that problem. Cases would not get backlogged at the decision stage because there would be more judges to decide them.

Mr. Chairman, this amendment is a no-lose proposition for the District of Columbia, the judiciary and the taxpayer. It simply says that we will try a more limited, narrowly tailored solution to the problem of appellate backlog and delay before embarking on a grandiose and expensive restructuring of the system. If this solution does not work, then the case for more far-reaching reform is bolstered. If it does work, then the taxpayers are spared additional costs and litigants in the District of Columbia will receive the benefit of an efficient, 2-tiered judiciary.

In any event, the GAO study called for in this amendment would provide an objective, third-party assessment of whether further reform is necessary.

I hope that my colleagues in both parties will join in supporting this compromise and frugal solution to the problems of the appel-

late backlog and delay in the District of Columbia. Thank you, Mr. Chairman.

The CHAIRMAN. Are there other comments?

Ms. NORTON. Mr. Chairman?

The CHAIRMAN. Ms. Norton?

Ms. NORTON. A brief comment. With all due respect to the ranking member, I have never heard of a temporary solution to a structural problem. The backlog of the court has continued to rise. A piecemeal, temporary solution does not begin to meet the problem. All trends have been upward in this court.

I do not see how members of this committee can say they know better than the D.C. Bar, which in a bipartisan fashion has supported this bill; that they know better than the courts themselves; that they know better than District officials.

This is the answer, this temporary answer, that the minority has always posited. It assumes that we have a temporary problem. All the evidence is to the contrary.

I ask that we go forward and allow the District of Columbia to do what almost every State does and have a 3-tier court system. Thank you, Mr. Chairman.

Mr. BLILEY. Would the gentlewoman yield?

Ms. NORTON. Of course.

Mr. BLILEY. What we are doing here, assuming that the bill passes unamended, we are not authorizing any funds and the chances of the District finding the money to do it anytime soon is remote. I would think most people would concede considering the financial difficulty of the District. What my amendment would do, my substitute would do would give them immediately two judges that they can put to work. Obviously, with the backlog everybody agrees there is plenty of work to go around. Then the GAO comes in with a report, and if what I propose did not work, you would be able to go forward with whatever is the GAO recommendation and whatever else might be necessary.

This gets at the problem right now, right up front, and does it with—

Mr. DELLUMS. Would the gentleman yield?

Mr. BLILEY [continuing]. Further action down the road. In fact, it may even bolster it.

It is not my time. It is the time of the gentlewoman. I thank her for yielding to me.

Ms. NORTON. Thank you. I do want you to know that the administration does not support any additional authorized funds, so that your amendment would not in fact authorize it. We could not get more judges out of your amendment, so it would not do us any good.

The CHAIRMAN. Is there further discussion?

[No response]

The CHAIRMAN. If not, the question recurs on the gentleman's amendment in the nature of a substitute. All those in favor, signify by saying aye.

[A chorus of "aye."]

The CHAIRMAN. Those opposed, signify by saying no.

[A chorus of "no."]

The CHAIRMAN. In the opinion of the Chair, the noes have it. The gentleman's substitute fails.

Are there further amendments to the bill?

[No response]

The CHAIRMAN. Hearing none, I will entertain a motion to report H.R. 1633 as amended to the full House.

Mr. DELLUMS. So moved, Mr. Chairman.

The CHAIRMAN. It has been moved that H.R. 1633 as amended be reported. Those in favor will signify by saying aye.

[A chorus of "aye."]

The CHAIRMAN. Those opposed, signify by saying no.

[A chorus of "no."]

The CHAIRMAN. In the opinion of the Chair, the ayes have it.

Mr. BLILEY. Mr. Chairman, on that I think we better have a roll-call vote.

The CHAIRMAN. A sufficient number of hands. The clerk will call the roll.

The CLERK. Mr. Dellums?

Mr. DELLUMS. Aye.

The CLERK. Mr. Wheat?

The CHAIRMAN. Aye, by proxy.

The CLERK. Mr. McDermott?

The CHAIRMAN. Aye, by proxy.

The CLERK. Ms. Norton?

Ms. NORTON. Aye.

The CLERK. Mr. Lewis?

The CHAIRMAN. Aye, by proxy.

The CLERK. Mr. Jefferson?

The CHAIRMAN. Aye, by proxy.

The CLERK. Mr. Bliley?

Mr. BLILEY. No.

The CLERK. Mr. Rohrabacher?

Mr. BLILEY. No, by proxy.

The CLERK. Mr. Saxton?

Mr. SAXTON. No.

The CLERK. Mr. Ballenger?

Mr. BALLENGER. No.

The CLERK. Mr. Stark?

The CHAIRMAN. The Chair votes aye.

The CLERK. Mr. Chairman, the vote is 7 ayes, 4 nays.

The CHAIRMAN. The bill will be favorably reported.

Before I recognize members, I would ask unanimous consent that the staff be permitted to make necessary technical and conforming changes in the preparation of the bills reported out today. If there is no objection, so ordered.

The gentleman from California seeks recognition.

Mr. DELLUMS. Mr. Chairman, I just wanted to make a brief comment and congratulate my colleague in his new role and say that it is a lot easier sitting to the gentleman's right than it was sitting to the gentleman's left.

The CHAIRMAN. I appreciate the gentleman's generosity.

Mr. BLILEY. Mr. Chairman?

The CHAIRMAN. Mr. Bliley?

Mr. BLILEY. Would you indicate to us what time frame we will be under in proceeding with this legislation?

The CHAIRMAN. The Chair would be willing to accommodate the members. I would suggest that there does not seem to be just a whole lot going on on the floor these days and that the leadership on our side would probably welcome some legislation from time to time.

Does the gentleman have any—if I could accommodate you as to recesses or family business for any particular day——

Mr. BLILEY. Well, when is the next District day?

The CHAIRMAN. It is the second and fourth Monday, and I do not have my calendar——

Mr. BLILEY. So it would be the fourth Monday. We would like to bring it up on the fourth Monday of June?

The CHAIRMAN. That would be the next day. I would have to confer with the leadership, but that would be the next.

Mr. BLILEY. I would have no problem with doing it that day. You know, I would say I might have a problem if we tried to do it before then.

The CHAIRMAN. Let me suggest to the gentleman that I will confer with the leadership and I will consult with the minority and/or the gentleman's staff.

Mr. BLILEY. Fair enough, Mr. Chairman. We will have the 3 days for minority views as usual?

The CHAIRMAN. You can have the 3 days for minority views. We are happy to accommodate the gentleman.

Is there any other business to come before the committee at this point?

[No response]

The CHAIRMAN. If not, the committee is adjourned. I want to thank the members very much for their attendance and their participation today.

[Whereupon, at 11:57 a.m., the committee was adjourned, to reconvene subject to the call of the Chair.]

[The following additional material was subsequently received for the record:]

APPENDIX

THOMAS J. BLILEY, JR.
30 DISTRICT VIRGINIA

MEMBER OF
COMMITTEE ON ENERGY
AND COMMERCE
COMMITTEE ON THE DISTRICT
OF COLUMBIA

Congress of the United States House of Representatives Washington, DC 20515

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Statement of Congressman Thomas J. Bliley, Jr. Before the Committee on the District of Columbia Mark-up of H.R. 1633 June 9, 1993

Mr. Chairman, this morning we are contemplating the authorization of more than \$16 million over 6 years for the creation of a new D.C. Supreme Court.

Proponents claim that a new court is necessary to relieve the workload of the court of appeals. But that court has not experienced a substantial increase in filings since 1986 and it is currently keeping pace with yearly filings.

Proponents also claim that a new court is needed to shorten the time it takes to complete an appeal. Yet about one-third of the time on appeal is caused by the time it takes the Superior Court to prepare the record for appeals. H.R. 1633 will do nothing to cure that delay and may succeed only in shifting appellate delay rather than shortening it.

Several weeks ago, the late D.C. Council Chairman John Wilson appeared before the Appropriations Committee to ask, not only for \$38 million over-and-above the moneys authorized under the federal payment formula, but for an additional \$26 million to fund the District's existing court system and police and fire departments. This \$26 million won't go for improvements. It is intended simply to keep the judiciary and the departments afloat for another 12 months.

When I suggested last year that the District could not afford to create a new court, my colleague, the Delegate from the District of Columbia, responded that "the cost of this court would not be totally borne by the District of Columbia until some years out." Well, if this bill had been enacted in 1989, when it was first introduced, we would be in those "out years" -- but we are still nowhere near a time when the District could afford a new court.

Mr. Chairman, last year the Superior Court was forced to cancel most jury trials during the month of August for lack of funds. Nor could the Superior Court afford to fill the positions of Director of the Civil and Criminal Divisions for some months. So too, the Court of Appeals was unable to fill the position of Clerk of the Court for many months. The

financial woes of the existing D.C. courts are so great that both the President and President-elect of the Bar Association warn that the courts have reached a "crisis point."

Things do not look like they will get better for the D.C. judiciary in the immediate future. In FY 1994, the Superior Court is facing an actual funding cut of 7.1 percent and the Court of Appeals is facing an actual funding cut of 3.8 percent even though D.C. spending is supposed to increase overall by 2.8 percent. In total, the D.C. judiciary will lose about \$6 million -- a bit more than this bill would spend in the first full year of the new court's existence. Worse, according to estimates published by the Administrative Office of the U.S. Courts, the first year start-up costs of a 9 judge appellate court is likely to be about \$2 million more than authorized in this bill. Does it really make sense for us to consider creating a new court when the District is clearly having a hard time paying for the ones it already has?

Last year, I introduced legislation that would give to the victims of violent crime in the District of Columbia the right to appear and be heard at sentencing and parole hearings and would require that victims receive notification of critical junctures of the judicial process. The Corporation Counsel for the District testified against those provisions on the grounds that they would "increase the length of judicial proceedings and governmental costs."

Mr. Chairman, how can we tell the survivors of the 489 people who were murdered in the District in 1991, or the 214 women who were raped, that we cannot afford to give them their day in court but we can afford to spend over \$16 million to help relieve the workload of an appellate court that hasn't seen a substantial increase in filings since the mid-1980s?

Proponents of H.R. 1633 try to cast it as a tough-on-crime measure. I would have thought that assuring year-round jury trials and fairness to crime victims would constitute more pressing criminal justice concerns. Indeed, I would have thought that simply funding the police department would be a more pressing law enforcement concern for the city! But putting that aside, it seems to me that adding an additional layer of appeals will simply serve to delay finality in most criminal cases.

Mr. Chairman, there is more to be said about whether a new appellate court is needed in the District of Columbia. In a few moments I will offer an amendment that I believe will enable the Court of Appeals to solve the problems that it faces at far less cost to the taxpayer and without radical change to the current court structure. I will reserve further comment until that time. In the meantime, I have some materials that I ask be inserted in the record.

Thank you, Mr. Chairman.

THOMAS J. BLILEY, JR.
2nd DISTRICT VIRGINIA

MEMBER OF
COMMITTEE ON ENERGY
AND COMMERCE
COMMITTEE ON THE DISTRICT
OF COLUMBIA

Congress of the United States
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Closing Remarks of
Congressman Thomas J. Bliley, Jr.
on H.R. 1633
Committee on the District of Columbia
Mark-up of H.R. 1633
June 9, 1993

Mr. Chairman, I would like to make a few, brief, closing remarks on H.R. 1633. The Republican members of the committee are united in the view that creating a new level of the District's judiciary would be unwise at this time. We have offered an alternative proposal: one that costs far less; would maintain a sleek, efficient two-tier judiciary; and yet would assist the local Court of Appeals in reducing both time-on-appeal and backlog problems. More, we have indicated a willingness to revisit the supreme court proposal should our more limited approach prove unsuccessful.

We have heard much about the reams and reams of paper that have been devoted to the studies and hearing transcripts which purportedly prove the need for a new Supreme Court for the District of Columbia. Those past studies do nothing of the sort. All but one of the studies done of this issue were produced between 1979 and 1986 -- a period in which the D.C. Court of Appeals was experiencing dramatic growth in case filings. The last, and most recent report, often referred to as the "Schaller Report," was published in 1989 and relied upon data for earlier years.

What is clear to us today, and was not and could not have been clear to the authors of those reports, is that 1986 was the peak year for appellate workload in the D.C. judiciary. Since 1986, new case filings in the Court of Appeals have remained fairly constant, the court's ability to dispose of cases has been increasing, and the court's backlog of cases -- which grew dramatically between 1976 and 1986 -- has been declining ever since. Moreover, throughout the years there has been a vocal opposition to the Supreme Court proposal. An opposition that includes significant segments of the local bar and judiciary as well as, for the last four years, the U.S. Department of Justice.

But even if one discounts the opposition and takes those studies at face value, those studies have all assumed a scenario where judicial workload would increase yearly with no end in sight. The record since 1986, however, shows that assumption to be wrong. In the meantime, the D.C. Court of Appeals has been quite successful -- and, indeed, should be

congratulated, -- in developing new and more efficient ways of handling its caseload. Given the Court's new efficiencies and the current caseload stability, it is highly questionable whether the recommendations that may have appeared reasonable under the very different circumstance of the 1976-1986 decade hold true today.

I believe that more modest solutions should be tried before the grandiose scheme contained in H.R. 1633 is put into place. Indeed, the point has been made repeatedly this morning that the District can ill afford the \$35 million price-tag that comes with this new court. It is simply wrong to foist that kind of a burden on the District when it can barely afford the judiciary it has.

There is only one way that the District can overcome its financial woes, and that is to set firm priorities and stick to them. H.R. 1633 is simply not a priority and should not be treated as one.

Thank you, Mr. Chairman.

SUMMARY OF REPUBLICAN AMENDMENTS

Ballenger Substitute for Norton Amendment--salaries for judges and justices. This amendment recognizes that D.C. judges are paid at much higher levels than state judges. If the District wants to be treated like a state, this should include salary levels. H.R. 1633 as currently written would provide a salary of \$147,690 for a justice and over \$150,000 for the Chief Justice. Even after Ms. Norton's amendment, salaries for a D.C. Supreme Court justice would be \$141,000. The Ballenger Amendment would establish the salary for a justice at \$127,530 and establish lower salaries for the judges on the lower court. While the Ballenger amendment will bring D.C. judicial salaries more into line with those provided by the states, under this amendment D.C. judges will still be paid more than any state Supreme Court judge as the following comparison shows:

<u>State</u>	<u>Highest Court Salary</u>	<u>Trial Court Salary</u>
California	\$121,207	\$99,297
Georgia	\$ 93,778	\$71,559
Louisiana	\$ 94,000	\$84,000
Missouri	\$ 91,594	\$79,164
New Jersey	\$115,000	\$100,000
North Carolina	\$ 90,054	\$75,774
Virginia	\$ 99,709	\$92,564
Washington	\$107,200	\$96,600
U.S. Average	\$ 90,714	\$80,824
Range	\$62,452 to \$121,207	\$61,178 to \$100,000

The amendment would also bring judicial salaries closer to those of the District's elected officials. The Mayor currently makes \$90,705 and the salary of the Chairman of the Council is \$81,885. District employees, including all elected officials sustained a five percent reduction in salary in the current fiscal year.

Ballenger--appointment of justices. H.R. 1633 elevates the current Court of Appeals judges to the new Supreme Court by statute. This amendment provides that the President will nominate the Supreme Court justices subject to Senate confirmation.

Saxton--bypass the intermediate court. This amendment should be noncontroversial if the true intent of this legislation is to increase judicial efficiency. It provides that the appeal of serious crimes and unconstitutional Council acts will go directly to the Supreme Court.

Bliley--a substitute for Title I. This amendment provides for the temporary expansion of the Court of Appeals and for a GAO study on the need for a permanent change in the structure of the court system.



United States Court of Veterans Appeals

Chambers of
Chief Judge Frank Q. Nebeker

625 Indiana Avenue, N.W., Suite 900
Washington, D.C. 20004
202-501-5862

April 20, 1993

The Honorable Eleanor Holmes Norton
Chairperson
Committee on the District of Columbia
Subcommittee on Judiciary and Education
House of Representatives
Room 1310, Longworth House Office Building
Washington, D.C. 20515-5101

Dear Congressman Norton:

I understand that on Wednesday, April 28, 1993, a hearing will be held again on the proposal for conversion of the present District of Columbia Court of Appeals by name, at least, into the Supreme Court of the District of Columbia, and the engrafting upon the Judiciary of the District of Columbia an intermediate appellate court. I have testified in the past years as a member of the District of Columbia Bar Committee, which has reported on the proposal. My position reflects a dissenting view. I regret that because of a commitment in this Court, I must decline the invitation to appear on the 28th. Please consider this letter as my current testimony.

I have, in the past, taken the position that the then caseload and disposition rate of the District of Columbia Court of Appeals was highly counter-indicative of the proposal. Given the current real figures respecting the District of Columbia Court of Appeals' dispositional rate and caseload, I remain convinced that the proposed change is unnecessary.

Aside from the above factors, the lack of necessity for an intermediate court can be further illuminated when one realizes that there is a declining population in the District of Columbia. In addition, it must be remembered that no other jurisdiction of comparable population or geographic size has so many available appellate judicial resources. There are not only the nine members of the District of Columbia Court of Appeals and myriad active retired judges, but a substantial portion of locally generated criminal and civil cases fall ultimately to the United States Court of Appeals for the District of Columbia Circuit.

The Honorable Eleanor Holmes Norton
Page Two

April 20, 1993

Were it not for the sincerity of those backing this court expansion proposal and their stature in the community, one might consider the proposal nearly frivolous. This is so, particularly, in terms of the anticipated cost which would necessarily follow. The budget situation in the District of Columbia is far more dismal today than two and three years ago when the proposal was earlier considered. So there are even stronger reasons for abandoning the idea today.

It is hardly consistent with President Clinton's admirable efforts to cut government spending that this proposal contains a provision which cleverly conceals and insulates its financial impact upon the District of Columbia budget. Indeed, I characterize such a scheme as the use of smoke and mirrors to blur the true financial impact it will have. The Bill provides that, for the first few years, a major portion of the cost of a new court, including the substantial increase in salaries for the current judges, will be borne by the federal government outside of the publicly proclaimed District of Columbia budget. This budgetary machination borders on the disingenuous. In reality, this proposal is going to add about \$8 million a year to the operating expenses of the District of Columbia courts, at a time when the current administration is attempting to curtail overall the cost of government.

I urge that any funds to be found for this court expansion should and must be used to help the Superior Court. I note the dire consequences of forcing jury trials to be suspended and reduction of Criminal Justice Act fees.

In short, this proposal, in my view, constitutes an unnecessary extravagance, no matter how it is packaged for budget purposes. If adopted, it will deprive the Superior Court of critical resources.

Sincerely yours,



Frank Q. Nebeker

cc: David E. Anderson, Esquire

	Highest Court		Intermediate Appellate Court		General Trial Court	Date of Last Salary Change
Alabama	107,125 (5)		106,125 (3)		72,500 (30) (105,125) 79,037†	10-1-91
Alaska	104,472 (8) to 105,876 104,472†		98,688 (8)		96,600 (4)** to 103,596 96,600†	1-1-91
Arizona	91,728 (24)		89,544 (18)		87,360 (15)	1-1-92
Arkansas	81,772 (39)		78,988 (32)		76,201 (33)	1-1-93
California	121,207 (1)		113,632 (1)		99,297 (2)	1-1-91
Colorado	84,000 (35)		79,500 (30)**		75,000 (36)	7-1-92
Connecticut	101,479 (9)*		94,359 (12)*		90,140 (11)*	7-1-92
Delaware	99,000 (15)**				94,100 (7)	7-1-90
Florida	100,443 (12)		95,421 (9)		90,399 (10)	1-1-91
Georgia	93,778 (21)		93,179 (15)		71,559 (21) (101,559) 83,502†	1-1-92
Hawaii	93,780 (20)		89,780 (17)		86,780 (17)	1-1-90
Idaho	74,701 (45)		73,701 (37)		70,014 (40)	7-1-91
Illinois	100,681 (11)		94,758 (10)		89,966 (16)	7-1-92
Indiana	81,000 (40)		76,500 (34)		61,740 (49)	1-1-91
Iowa	90,300 (28)		86,800 (23)		82,500 (24)	7-1-92
Kansas	82,005 (37)		79,079 (31)		71,291 (38)	8-1-92
Kentucky	77,498 (41)		74,335 (36)		71,172 (39)	7-1-91
Louisiana	94,000 (19)		89,000 (20)		84,000 (20)	7-1-92
Maine	83,616 (36)				79,073 (34)	7-1-92
Maryland	99,000 (15)**		92,500 (16)		89,000 (13)	7-1-90
Massachusetts	90,450 (27)		83,708 (29)		80,360 (27)	7-1-88
Michigan	106,610 (6)		102,346 (5)		94,133 (6) (98,081) 98,081†	1-1-90
Minnesota	94,395 (18)		88,945 (21)		83,494 (22)	1-4-93
Mississippi	75,800 (43)				66,200 (45)	7-1-89
Missouri	91,594 (25)		85,500 (25)		79,164 (29)	8-28-90
Montana	62,452 (50)				61,178 (50)	7-1-92
Nebraska	88,157 (31)		83,749 (28)		81,546 (25)	7-1-92
Nevada	85,000 (34)**				79,000 (31)*	7-1-91
New Hampshire	88,200 (30)				82,687 (23)	11-2-90
New Jersey	115,000 (3)**		108,000 (2)		100,000 (1)	1-1-91
New Mexico	75,000 (44)		71,250 (38)		67,500 (43)	7-1-90
New York	115,000 (3)**		102,500 (4)		95,000 (5)	10-1-87
North Carolina	90,054 (29)*		85,290 (26)*		75,774 (35)*	7-1-92
North Dakota	71,555 (47)				65,970 (46)	7-1-92
Ohio	101,150 (10)		94,200 (13)		76,150 (37) to 93,650	1-1-92
Oklahoma	81,874 (38)		76,786 (33)		69,631 (41)	12-1-92
Oregon	76,400 (42)		74,600 (35)		69,600 (42)	7-1-90
Pennsylvania	105,000 (7)		101,500 (7)		90,000 (12)	12-18-92
Rhode Island	95,149 (16)*				85,666 (18)*	3-22-92
South Carolina	92,986 (23)		88,338 (22)		88,338 (14)	9-2-92
South Dakota	69,980 (49)				65,354 (47)	7-1-92
Tennessee	93,540 (22)		89,184 (19)		85,344 (19)	7-1-92
Texas	94,685 (17)		89,952 (14)		85,217 (8) (93,685) (92,685) 92,685†	12-1-92
Utah	88,000 (32)		84,000 (27)		80,000 (28)	1-1-93
Vermont	70,775 (48)				67,230 (44)	1-6-91
Virginia	99,709 (13)		94,724 (11)		92,564 (9)	12-1-90
Washington	107,200 (4)		101,900 (6)		96,600 (4)**	9-3-92
West Virginia	72,000 (46)				65,000 (48)	1-1-90
Wisconsin	91,252 (26)		85,919 (24)		80,548 (26)	7-1-92
Wyoming	85,000 (34)**				77,000 (32)	1-1-93
Mean (Average)	90,714		89,379		80,824	
Median	91,425		89,092		81,047	
Range	62,452 to 121,207		71,250 to 113,632		61,178 to 100,000	
District of Columbia	141,700				133,600	1-1-93
Federal System	164,100		141,700		133,600	1-1-93
American Samoa	74,303					N/A††
Guam					100,000	10-1-91
Northern Mariana Islands	79,000				72,400	1-10-92
Puerto Rico	80,000		70,000		50,000 to 58,000	10-1-92
Virgin Islands					75,000	10-1-89

* The base pay is supplemented by increments for length of service.

** Tie rank.

† Median salary. If more than half the salaries are the same as the minimum or the maximum salary, then the median (the midpoint above which and below which half the salaries fall) is either the minimum or maximum salary.

†† Data not available.

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2

The Appellate Explosion: Remedies for Appellate Overloads

2.1 The Appellate Explosion

The accepted model for fair appellate procedure, which was generally followed in the United States without question for many years, was that¹

- (1) a party had a right to appeal to one appellate court, at least from an adverse final judgment;
- (2) a party was entitled to present arguments to the appellate court both in written briefs and orally;
- (3) the appellate decision-making process reflected both the individual thinking of each judge and the effect of consultation among the judges; and
- (4) the court disclosed the reasoning underlying its decisions.

These fundamental elements of the appellate process are being impaired, however, as a result of the rapid increase in the number of cases taken to the appellate courts in recent years.

In the United States Supreme Court the number of cases filed skyrocketed from 1,181 in the 1950 Term to 4,240 and 4,493 in the 1986 and 1987 Terms.² In the United States courts of appeals, the number of cases filed in all the circuits combined was approximately 1,600 in 1924, 3,900 in 1960, 11,662 in 1970, 20,219 in 1979, and

¹P. CARRINGTON, D. MEADOR, AND M. ROSENBERG, *JUSTICE ON APPEAL* 7-11 (1976); AMERICAN BAR ASSOCIATION COMMISSION ON STANDARDS OF JUDICIAL ADMINISTRATION, *STANDARDS RELATING TO APPELLATE COURTS*, Sec. 3.10, at p. 15 (1977); A. Hellman, *Central Staff in Appellate Courts: The Experience of the Ninth Circuit*, 68 CAL. L. REV. 937, 937-938 (1980).

²These statistics are from those compiled by the Clerk's Office. See also G. CASPER AND R. POSNER, *THE WORKLOAD OF THE SUPREME COURT* 3, 12, Tables 1.1 and 2.1 (American Bar Foundation, 1976); FEDERAL JUDICIAL CENTER, *REPORT OF THE STUDY GROUP ON THE CASE LOAD OF THE SUPREME COURT* (1972), reprinted in 57 F.R.D. 573, Tables I and II, pp. A1-A2, at pp. 613-614. The figures include paid cases, *in forma pauperis* cases, and original cases.

35,000 in 1987.³ Thus, the number has multiplied by eight in the last 25 years, during which the number of circuit judges has more than doubled from 78 to 168.⁴

The situation in the state appellate courts has been substantially the same. The caseload in the California Supreme Court is now very close to that of the United States Supreme Court. A study by the National Center for State Courts of the number of opinions issued by state supreme courts without discretionary jurisdiction concluded that the number of appeals nationwide had doubled between the 1950s and 1975, but that in many intermediate appellate courts the number had tripled.⁵ Surveys in 1985 showed that the number of appeals, in 25 out of the 42 states for which figures were available, increased over 100 percent between 1973 and 1983. In only one of those 42 states was the increase less than 50 percent. Overall, the increase was 112 percent. This was "more than ten times the population growth" of 11 percent, four times faster than trial court judgeships, and "three times faster than appellate judgeships."⁶

This appellate explosion has been much more rapid than the rate of expansion of the business of the trial courts. It has not been limited to criminal cases, which have sometimes been regarded as primarily responsible for the increase in appellate business. As in the federal courts, the number of state appellate judges has not grown with the workload, and that has had a significant effect upon the operations of the courts.

The causes of this appellate explosion, which include increases in population, the number of trial judges, and the subjects of federal and state statutory regulation, as well as changes in Supreme Court interpretations of the United States Constitution and federal statutes, are beyond the scope of this book. These causes and their effects are not likely to be eliminated or substantially restricted by legislation or other means. The number of appeals is thus more likely to continue to increase than to decline.

Various methods of dealing with the problems of appellate overloads have been suggested.⁷ Many have been utilized in the appellate courts of the United States and other nations. This chapter will review those proposals and experiences so as to familiarize persons in

³ANNUAL REPORTS OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, Table B-1; P. Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 543 (1969).

⁴See 28 U.S.C. §44, as amended up to 1987.

⁵S. WASBY, T. MARVELL, AND A. AIKMAN, VOLUME AND DELAY IN STATE APPELLATE COURTS 13-16 (National Center for State Courts, 1979).

⁶T. Marvell, *Is There An Appeal From The Caseoad Deluge?* 24 JUDGE'S J. 34, 36 (Summer 1985); BUREAU OF JUSTICE STATISTICS BULLETIN, 1973-83 TRENDS: THE GROWTH OF APPEALS 3 (Feb. 1985). "State appellate court caseoads have, on the average, doubled every ten years since the second world war." TENTATIVE DRAFT OF REPORT OF COMMITTEE OF AMERICAN BAR ASSOCIATION, APPELLATE JUDGES' CONFERENCE, STANDARDS RELATING TO APPELLATE CASEFLOW MANAGEMENT AND DELAY REDUCTION 9 (1987).

⁷As by the abolition or narrowing of the diversity jurisdiction of the federal courts, which has been long but unsuccessfully proposed. AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 99-161 (1969).

the various American jurisdictions with what has been done elsewhere. This may assist them in determining the best means of coping with their own problems. Lawyers who practice in appellate courts may also benefit from knowledge of the effects of growing workloads on how such courts operate.

2.2 Remedies Commonly Used in All American Courts

Most American appellate courts—supreme and intermediate—already have adopted the most obvious and simple methods of increasing the number of cases a court or individual judge can handle.

(a) Legal Assistants to Judges

As shown in Sec. 1.6, *supra*, every appellate court now provides each judge with from one to three law clerks (who are not really clerks, but judge's assistants), with four in the United States Supreme Court and even more in the Supreme Court of Pennsylvania.⁸ The federal appellate courts and those of all but seven states (as of 1984)⁹ also provide for central staff attorneys who work for the court as a whole. The staff attorneys and judge's clerks summarize petitions for review, briefs, and records, engage in research, and write memoranda and drafts of opinions for judges, all of which saves a substantial amount of judicial time and enables the judges to handle more cases.

(b) Shorter Briefs

A large majority of the state and the federal appellate courts, including the United States Supreme Court since 1980, now limit the length of briefs, usually to 50 pages for briefs on the merits; a few states allow less and a few more. See Sec. 8.6, *infra*. This reduces the amount of reading matter for the judges. Counsel may move for leave to file longer briefs if they believe the case so requires.

Some states have also experimented with accelerated appeals when the record of relevant material can be prepared speedily, usually because no, or very little, testimony has been taken or needs to be transcribed. These are often, but not always, simple cases which permit limiting the written argument to briefs or memoranda filed below or supplemental or short briefs, shortening the oral argument to 15 minutes or less, and establishing a briefing schedule of 15 days for each of the principal briefs. This substantially lessens the time needed to dispose of an appeal, which is desirable in and of itself.

⁸R. ROPER, 1984 STATE APPELLATE COURT JURISDICTION GUIDE FOR STATISTICAL REPORTING, Table 1 (National Center for State Courts, 1985).

⁹Delaware, Maine, Missouri, Montana, Nebraska, New Hampshire, Vermont. *Ibid.* Eleven states provide staff attorneys for their supreme court or intermediate courts, but not for both.

Since the records, briefs, and arguments in such cases are usually short, the amount of judge time saved may not be very great, however. Experiments along this line in the Courts of Appeals of Arizona and Colorado have been abandoned. See Sec. 9.2, *infra*.

(c) *Eliminating or Shortening Oral Argument*

Almost half of the states, as well as the federal courts of appeals and the Supreme Court of the United States, also save time by eliminating oral argument in cases to be decided on the merits when all the judges who will hear a case agree that argument will not be helpful, usually because the issues presented are frivolous or insubstantial.¹⁰ In some state courts, such as the appellate courts of Indiana and the Oklahoma Court of Criminal Appeals, oral arguments are seldom allowed. When oral argument is allowed, the maximum time is now usually 30 minutes for each side, but often substantially less, although a party may request more time when necessary. Even the Supreme Court of the United States now allows only 30 minutes in almost all cases accepted for argument, and decides many appeals without argument. In the federal courts of appeals and a few states, the courts specify the time case by case, often allowing as little as 10 to 20 minutes. See Secs. 13.1–13.2, *infra*.

The benefit of screening cases to determine which should not be heard orally is not merely the saving of the 30 minutes to an hour that would be spent hearing oral argument. Such screening also saves judges (as well as counsel) the "time required to prepare for argument," and gives the judges "greater flexibility" in allocating their time. "For example, some screening procedures permit judges to decide nonargued cases at a single sitting immediately after reviewing the briefs and record: thus the judges do not have to spend time becoming reacquainted with the facts and issues before argument and before preparing the disposition. Some procedures permit judges to review and decide cases at convenient times without convening the panel, rather than at scheduled times in chambers or in conference."¹¹ Informal or telephonic discussion may be adequate, and for some courts may avoid the need for travel.¹² Thus screening permits a court to give more time to cases that will be helped by oral clarification of the briefs, and also enables the appellate court to consider more cases.

The effect of the increase in the workloads of appellate courts is

¹⁰R. ROPER, *supra* note 8, at Table 3. Rule 34(a) of the Federal Rules of Appellate Procedure prescribes a minimum standard for the federal courts of appeals which all of the circuits have adopted. See Sec. 13.1, *infra*.

¹¹J. CECIL AND D. STIENSTRA, DECIDING CASES WITHOUT ARGUMENT: A DESCRIPTION OF PROCEDURES IN THE COURTS OF APPEALS 3 (Federal Judicial Center, 1985).

¹²The cost in time and money for both judges and counsel can also be reduced by the use of such modern techniques as satellite transmission and television for oral arguments, as the Supreme Court of Canada and a Washington Court of Appeals are already doing for certain types of short arguments. See Sec. 18.7, *infra*.

thus of more than mere academic or historical interest to appellate counsel. Counsel should keep in mind, in preparing for an appeal, that in some courts the briefs initially must persuade the court that the case has enough merit to be heard orally, a function not dissimilar to the burden of persuading a supreme court to take a case in the exercise of its discretionary jurisdiction. Compare Sec. 6.7(c), *infra*. Counsel should be aware that, depending on the size of its caseload, an appellate court summarily may dispose of frivolous appeals as well as appeals that the judges do not find very difficult. If a case lends itself to such treatment, the brief should, in addition to arguing the merits, give reasons why the issues involved are generally important enough for the court to hear, that is, if possible, important to persons other than the parties to the case.

Even more obvious to the advocate is the significance of the little time allowed for oral argument. Except in the simplest cases, counsel is likely to find compression of the oral argument he would like to present into the time allowed a painful as well as a painstaking process—and all the more so if counsel endeavors to leave one third of the time for answering questions, which as a practical matter is necessary in many courts. But counsel who does not prepare the argument with such considerations in mind is likely to have a rude awakening. More detailed treatment of these problems is left to chapters 12–15, which deal with briefing and arguing. It is important, however, that lawyers be aware of not only the limitations imposed on them but also the reasons why the courts impose such restrictions.

(d) *Fewer and Shorter Opinions*

Perhaps most timesaving for judges is the increasingly prevalent practice of dispensing with written opinions.¹³ Many courts, both state and federal, write short memorandum opinions, often only a single paragraph, which explain the basis for a decision. The pressure of heavy workloads has induced a number of courts to decide cases with orders that say only “affirmed.”¹⁴

(e) *The Cost of These Methods of Saving Judicial Time*

These practices, and particularly writing shorter and fewer opinions, undoubtedly save a substantial amount of judicial time, but at a price. The failure to state publicly the reasons for a decision omits what has reasonably been regarded as an “imperative” of the judicial process and as essential to its “integrity.”¹⁵ A statement of reasons, however short, demonstrates that the court has acted judicially, not

¹³See Sec. 17.5, *infra*.

¹⁴*Ibid*.

¹⁵P. CARRINGTON, D. MEADOR, AND M. ROSENBERG, JUSTICE ON APPEAL 8–10 (1976).

arbitrarily. Simply to say "affirmed" should not be enough, although "affirmed for the reasons stated by the court below" may suffice if the court below stated its reasons.

Some intermediate courts, however, go too far in the opposite direction. A large proportion of their unpublished memorandum opinions are over five typewritten pages long, a substantial part of which is devoted to explaining the facts and issues of the case. Because most unpublished opinions will probably be read only by counsel for the parties, a few paragraphs stating the reasons should be intelligible to persons familiar with the case. The preparation of opinions long enough to enable a higher court, or others, to understand the case largely defeats the goal of saving time for the overburdened intermediate appellate judges. In the small proportion of cases that go to a higher court, that court should be able to discover what the case is about from the first few pages of the appellant's brief or petition for review.¹⁶

Denying oral argument completely deprives counsel of the contact with the appellate judges which gives assurance both to counsel and the party that the judges have paid personal attention to the case. Shortening briefs and oral arguments deprives counsel of some of their opportunity to justify their positions. Allowing 10 to 15 minutes to argue does not permit counsel to say much, or to do more than answer a few questions. In some cases that may tell the court as much as it needs to decide the case, and, except in a few cases of exceptional magnitude, 50 pages may be enough for a brief. But there are cases in which more time and longer briefs are necessary for the adequate presentation of an argument. The timesaving derived from restricting counsel by these methods does not amount to very much per case, and is limited if the judges are to obtain a full understanding of the arguments.

There are also limits on the extent to which appellate judges can rely on legal assistants—law clerks or staff attorneys—to do their work, if the decision is to reflect the judge's own thinking. Even a conscientious, hard-working judge who receives a staff memorandum which seems reasonable on its face may not take the time to become personally familiar with the record, the briefs, or the authorities. "A judge with a large staff is less a professional craftsman, and more an administrator."¹⁷ Though the decision will still be the judge's, it may not embody the judge's personal reaction to the relevant legal and factual material presented by the parties. The judge will become more

¹⁶Over half the unpublished "written orders" with which the Illinois Appellate Court disposes of unimportant or insubstantial appeals are over five pages long. REPORT OF SPECIAL RULE 23 STUDY COMMITTEE OF THE ILLINOIS STATE BAR ASSOCIATION 30 (June 3, 1987). This may be deemed necessary to satisfy the part of Illinois Supreme Court Rule 23 requiring that cases not disposed of by opinion "shall be disposed of by a written order which shall succinctly state the facts, the contentions of the party, the reasons for the decision, the disposition, and the names of the participating judges. [Such] orders are not precedential and will not be published." This provision does facilitate review of Appellate Court orders by the Illinois Supreme Court, but it substantially increases the burden on the overloaded Appellate Court.

¹⁷P. CARRINGTON, D. MEADOR, AND M. ROSENBERG, JUSTICE ON APPEAL 45 (1976).

of an editor or supervisor. As the number of attorneys who work for a judge increases, whether in his office or on the court staff, "his work inevitably becomes less the product of his own mind and more the product of a team. * * * The larger the judge's personal retinue becomes, the greater is the tendency of the judge to confer with his staff rather than with his judicial colleagues."¹⁸

This does not mean that conscientious judges should not benefit from the work of their legal assistants. But there is a limit to the extent they can rely on such work without abandoning some of their judicial responsibility. It has been suggested¹⁹ that the professional staff working for a judge be limited to not more than three law clerks and staff attorneys.

2.3 Increased Number of Judges and Use of Panels

The preceding description of the methods used by many appellate courts to increase their capacities is not intended to minimize the value of those procedures, but rather to suggest there are limits to what can be accomplished by them. They clearly are no longer sufficient to enable most appellate courts to handle their present case-loads satisfactorily. Most courts, therefore, have adopted other methods, the simplest one being to increase the number of judges. For example, the statute governing Minnesota's new court of appeals provides (as of 1987) that it shall consist of 12 judges, and that every two years the number shall be adjusted, up or down, one judge for every 100 cases.²⁰

(a) *Intermediate Appellate Courts*

Without increasing the number of judges, a court can augment its capacity to dispose of cases by sitting in panels.

Most intermediate appellate courts sit in panels of three, either in permanent panels or by rotating the judges. All federal courts of appeals, only one of which has less than nine judges, rotate. Rotation means that a court need not be enlarged in multiples of three since all the judges need not be sitting at the same time. As in the Illinois Appellate Court, districts or divisions consisting of four or five justices sit in rotating panels of three, which can hear proportionately more cases than a fixed three-justice panel.

Probably for historical reasons, a few intermediate appellate courts, most notably the New York Appellate Division and the Alabama

¹⁸*Ibid.*

¹⁹*Id.* at 48.

²⁰Minn. Stat. 480.A.013 (1984). Whether or not by coincidence, an excellent study of the problems of appellate courts concluded that the caseload of an intermediate appellate court should not exceed 100 cases per judge. JUSTICE ON APPEAL, *supra* note 17, at 143.

Court of Criminal Appeals, sit in panels of five. A few courts, such as the Court of Appeals for the Federal Circuit in some cases, sit in panels of five, or *en banc* in the nine-judge Pennsylvania Commonwealth Court, or in the nine-judge Georgia Court of Appeals when there has been a dissenting vote in the three-judge panel.²¹ The courts which sit in panels larger than three could expand their capacity by reducing the panels to three justices.

A difficulty with appellate courts consisting of many panels, particularly when the judges rotate and cases are assigned by lot, is that no one can predict with any certainty how a case will be decided. A large court can be divided up into an almost infinite number of combinations of three judges. Although the panels usually attempt to be consistent, this often "makes the appellate process more a game of chance" than a "ritual of reason and principled decision-making."²² The resulting uncertainties as to what the law is will be difficult to cure by rare *en banc* sittings of the entire court or large portions of it, or by a review of less than one percent of the decisions by a supreme court.

The problem can be resolved if intermediate courts sit in panels with exclusive jurisdiction over specific subjects. This would enable judges to concentrate on and become familiar with particular subjects, which would allow them to work more rapidly and save some appellate time. Several methods of allocating cases by subject to different divisions or panels of the federal courts of appeals have been proposed.²³ Such a system would not cause undesirable specialization if each division or panel had jurisdiction over a number of subjects. A plan of this sort might be appropriately used in courts composed of many judges, as are most federal circuits and a number of the state intermediate appellate courts.

The division of appellate courts—both supreme and intermediate—into panels, each of which is assigned a number of specified subjects, is the practice in many European nations, as is shown in Sec. 2.6(c), *infra*. Furthermore, if an intermediate court, state or federal, was given exclusive jurisdiction over a subject or subjects, conflicts between such courts could not arise, and there would be fewer cases for a supreme court to review. Examples in the United States are the Court of Appeals for the Federal Circuit, the Tempo-

²¹When, in civil cases, the Louisiana Court of Appeals reverses or modifies the trial court and one appellate judge dissents, the case must be reargued before at least five judges of the Court of Appeals. La. Const. Art. V, §8; La. Ct. of Appeals Rule 1.5. Similarly, the new Virginia Court of Appeals of 10 judges must sit *en banc* (with at least 8 judges) when a member of a panel of three has dissented, a party has requested and two other judges have agreed, or when any member of a panel certifies that the panel's decision conflicts with a prior decision of the court or a panel and two other judges concur. Va. Stat. Code 17-116-02.

²²P. CARRINGTON, D. MEADOR, AND M. ROSENBERG, JUSTICE ON APPEAL 157 (1976).

²³P. Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 587-596 (1969); T. Thompson, *Increasing Uniformity and Capacity in the Federal Appellate System*, 11 HASTINGS CONST. L.Q. 457, 489-491 (1984); AMERICAN BAR FOUNDATION, ACCOMMODATING THE WORKLOAD OF THE UNITED STATES COURT OF APPEALS: REPORT OF RECOMMENDATIONS 5-7 (1968).

rary Emergency Court of Appeals, the Courts of Criminal Appeals of Alabama, Tennessee, and Alaska, and the Commonwealth Court of Pennsylvania which has jurisdiction over most civil governmental appeals. See text at note 109.

(b) Supreme Courts

If all the members of a court generally sit together (*en banc*),²⁴ as most supreme courts in the United States do, the size of the court cannot be indefinitely enlarged. The United States Supreme Court, the Supreme Court of Canada, and six states have nine justices.²⁵ The High Court of Australia and 26 states have seven, and 18 states have five.²⁶ Experience has demonstrated or indicated that courts in which over nine justices sit at a time become unwieldy. Supreme courts with less than nine justices could presumably increase the number of cases they can hear by increasing the number of justices to nine, or even more, but there does not seem to be any effort to expand the size of such courts for that purpose.

A number of supreme courts often, but not always, sit in rotating panels of less than the full bench in order to decrease the number of cases each judge must hear, or, conversely, to increase the number of cases the same number of judges can decide. In some states this procedure is authorized by constitution or statute, but in others it has been created by the court itself in reliance upon the requirement that a majority of the judges constitutes a quorum. The rotating-panel system avoids the disadvantage of permanent panels, which are more likely to reach conflicting results. The decision of a panel

²⁴The federal courts of appeals occasionally sit *en banc*. Section 6 of the Act of October 20, 1978, 92 Stat. 1633, 28 U.S.C. §41 (Notes) provides that a circuit having over 15 judges may "constitute itself into administrative units," and "perform its *en banc* function by such number of members of its *en banc* courts as may be prescribed by rule of the court of appeals." The Ninth Circuit, which now has 28 judges, subsequently provided in its Rule 25 (1980) for *en banc* courts composed of the chief judge and 10 other circuit judges drawn by lot, with the court reserving the right to order a hearing by the full court "in appropriate cases." It never has.

²⁵Alabama, Iowa, Mississippi, Oklahoma, Texas, and Washington. The British House of Lords (for judicial purposes) consists of the Lord Chancellor (a member of the cabinet), 9 or 10 Law Lords who are customarily appointed from the judiciary, and peers who have held high judicial office, generally former Lords Chancellor. The Judicial Committee of the Privy Council, which is the supreme judicial authority for the remainder of the Commonwealth which has not opted out (as have Canada, India, and Australia), consists of the same judges as the House of Lords; sometimes high judges from other Commonwealth countries, particularly in hearing appeals from their own countries, also sit. See REPORT OF THE CANADIAN BAR ASSOCIATION COMMITTEE, THE SUPREME COURT OF CANADA 28, 35-37, App. 5-3, 6-1 to 6-3 (1987); T. Allen, *Their Lordship's House: The Little Known Supreme Tribunal*, CHI. B. ASS'N REC. 18 (Jan. 1988). These courts sit in panels of five.

²⁶As to Australia, see REPORT, *supra* note 25, App. 5, at p. 1. States with seven justices: Arkansas, California, Colorado, Connecticut, Florida, Georgia, Illinois, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Virginia, and Wisconsin. States with five justices: Alaska, Arizona, Delaware, Hawaii, Idaho, Indiana, Nevada, New Hampshire, New Mexico, North Dakota, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, West Virginia, and Wyoming.

is that of a court if a majority of the full court concurs. The rotating panel usually consists of four or five judges out of seven or nine, or three out of five. Alabama, Iowa, Canada, and the British Lords require five out of 9 (or 10 or 11 lords). In Connecticut, Massachusetts, and Australia, cases are usually heard by five out of seven; in Florida, Maine, and Nebraska by six and occasionally five out of seven; and in Delaware and New Mexico, three out of five.²⁷ In cases of special importance or when the judges disagree, the full court will probably sit.

In Missouri, Oregon, and Washington the supreme courts were formerly divided into two parts for most cases. The Washington court still sits in two departments of five (each including the Chief Justice) which pass only on petitions for review and motions. In Mississippi, which has no intermediate court, the supreme court of nine sits in panels of three: if any justice dissents or so requests, the case is submitted to the full court. Opinions, but not *per curiam* orders, are voted on by the whole court, even though only a panel may have heard the argument.²⁸ In all of these states, a case can be submitted to the full bench if the judges on the smaller panel are not unanimous.

While the use of panels smaller than a full court enables a court to decide more cases, it has a price. The court as a whole may have a broader perspective. Appellate judges are not fungible. The absence from a case of a judge with a different approach or philosophy, or who may be more persuasive, may affect the way a case is decided.

The capacity of supreme courts would also be increased if the caseload could be divided among different panels, divisions, or departments which had final authority over the cases assigned to them. Many nations allocate appeals to different bodies of judges, usually by subject matter. No American jurisdiction has adopted such a system except for Oklahoma and Texas, each of which, as noted in Sec. 1.3, *supra*, has a separate supreme court for criminal cases entitled the Court of Criminal Appeals. In most American jurisdictions a change in that direction would be regarded as a revolutionary step, although a similar proposal has recently been advanced out of desperation for the Supreme Court of California. See note 114, p. 57, *infra*. Certainly it would not be warranted—or, at least, there would be no chance of it being accepted—until less drastic steps have been tried and proved inadequate. For this reason, the analysis of such a method of coping with the overload problem will be reserved for the last section of this chapter.

²⁷ See T. Marveil and M. Kuvkendail, *Appellate Courts—Facts and Figures*, 4 STATE COURT J. 9, 13, 35 (No. 2, Spring 1980). With respect to Great Britain, Canada, and Australia, see REPORT, *supra* note 25.

²⁸ Mississippi Supreme Court Rule 24 (1988); *Russell v. State*, 312 So. 2d 422, 425 (1975), and the Mississippi opinions as reported in 486 So. 2d (1986). Fifteen years ago, Chief Justice Gillespie of the Mississippi Supreme Court stated that "it would have been impossible for the court to keep abreast of its workload were the court not allowed to sit in divisions." See D. Baker, W. Watkins, and T. Tardy, *Appellate Court Reform*, 45 MISS. L.J. 121, 159 n.123 (1974).

2.4 Intermediate Courts and Discretionary Review

The best-known method of relieving supreme courts of larger caseloads than they can handle entirely on their own is to establish intermediate appellate courts to review the decisions of the trial courts and to give a supreme court discretionary authority to determine which decisions of the intermediate court it will review. Thirty-eight states (including North Dakota's "temporary court of appeals" referred to in Chapter 1, note 14, *supra*), like the federal government, now have such an appellate structure. In many states with intermediate appellate courts, particularly the more populous jurisdictions, the appellate structure closely resembles the federal. Less populous states differ from the federal system in various respects, but each gives its highest court general discretion to decide which cases it should accept for review.

In every state the highest court must accept and decide certain categories of cases on appeal from a trial court or intermediate appellate court. See Secs. 6.3–6.6, *infra*. The scope of these categories to a large extent determines how effectively a high court can control the number of cases it will hear.

Experience has demonstrated that the excepted categories may constitute a substantial portion of the cases which a supreme court must hear and resolve on the merits. One method of reducing any supreme court's overload is thus to reduce the number of exceptions from its discretionary jurisdiction. This was certainly true in New York (see Sec. 6.4(b) and (c), *infra*), and may be in other states as well.

Even though the percentage of direct appeals to the United States Supreme Court has been small, those appeals have in the recent past constituted as much as one third of the roughly 150 cases argued orally each Term. The Court has for some time attempted to relieve itself of the burden of these direct appeals, in which it was required by statute to decide on the merits cases which it regarded as not of sufficient public importance to warrant review. In response to the Court's urging,²⁹ since 1970 Congress has in a series of enactments eliminated almost all of the direct appeals. The earliest of these laws had repealed provisions for direct appeals in some types of criminal and Interstate Commerce Commission cases, all but a very few antitrust cases, and all suits before three-judge district courts to enjoin the enforcement of state or federal laws on grounds of federal unconstitutionality. The most recent measure, enacted in June 1988, eliminated such appeals from both state and federal courts in suits challenging the federal constitutionality of state or federal laws, and

²⁹Letter from Supreme Court of the United States dated June 1978, quoted in R. STERN, E. GRESSMAN, AND S.M. SHAPIRO, *SUPREME COURT PRACTICE* 34 (6th ed., 1986), and 125 CONG. REC. 3058 (1979); letter from Court dated June 17, 1982, quoted in H.R. REP. NO. 100-660, 100th Cong., 2d Sess. 27 (1988), and in an article by Stern, Gressman, and Shapiro entitled *Epitaph for Mandatory Jurisdiction*, A.B.A.J. 66 (Dec. 1988).

several other types of appeals. Pub. L. No. 100-352, 102 Stat. 662, June 27, 1988. This has reduced the direct appeals to a few categories which in the past have included only a small number of cases. See Secs. 6.3 and 6.4, *infra*.

The effect of the 1988 Act, Chief Justice Rehnquist has estimated, will be to "give us some fifteen or twenty new slots" for cases "sufficiently important to warrant discretionary review."³⁰ This would, of course, be helpful,³¹ but not substantial enough to solve the Court's problem in the long run.

2.5 Supreme Court Screening Prior to Hearing Below

Seven states avoid a double appeal by having their supreme courts screen all or most appeals before they are heard by either the appellate court or the supreme court. Decisions in the cases left to the courts of appeals are, however, still subject to discretionary review by the supreme courts. In five states—Iowa, Hawaii, Idaho, Oklahoma (for civil cases), and North Dakota at least temporarily—the governing law requires that all appeals from the trial courts be taken to the state supreme court. That court (in Iowa a panel of three justices, and in Hawaii the Chief Justice or an assignee) then has discretion to transfer to the state court of appeals the cases it does not wish to retain.³² The supreme courts are not to transfer cases over which they have exclusive jurisdiction (such as capital punishment cases in Idaho), but otherwise consider such factors as the presence of constitutional or other important issues, a conflict of decisions, life sentences, the need for a prompt decision, and, in Idaho and Hawaii, the workload of each court.³³

The Oklahoma rules embody no standard directly limiting the Supreme Court's discretion in retaining or transferring cases, but Rule 3.2 provides that, within 10 days after the filing of an appellee's brief, any party in a case which had been transferred to the Court of Appeals may move that the Supreme Court retain it because it presents a matter of first impression, seeks overruling or controlling

³⁰Remarks of Chief Justice Rehnquist at American Law Institute meeting, May 19, 1987, at pp. 9-10.

³¹In the 1986 Term, the Court accepted for argument 16 out of 54 appeals taken from the federal courts and 6 out of 140 from state courts. Out of the 148 cases argued during that Term, 16 were appeals from federal courts and 17 from state courts. A glance at the opinions in these cases gives the impression that a substantial number of them would have been heard on certiorari even if all appeals had been eliminated.

³²In Iowa and Oklahoma, the courts of appeals consist of 6 and 12 judges, and sit in panels of 3; in Hawaii and Idaho the courts consist of only 3 judges. In Idaho and Hawaii, the court of appeals may also transfer cases to the supreme court, but that court must consent.

³³Iowa Rule 4011; Hawaii Rule 31(a); Idaho Stats. Ch. 24, Secs. 2404-2409. The Idaho Supreme Court may also assign to the Court of Appeals (which consists of three judges) additional retired district or appellate judges as needed. Upon motion of a party or its own motion, either the Court of Appeals or the Supreme Court may transfer appeals back to the Supreme Court. Idaho Code §1-2406, as amended, effective July 1, 1981; Idaho App. Rule 108.

precedents, or "presents a question of constitutional law or * * * of substantial public interest."

In these states,³⁴ the supreme court reviews the cases on the basis of papers required to be filed with the notice of appeal and assigns a large portion of them to the court of appeals. Undoubtedly, in each of the states, the supreme court takes into account the number of judges in the court of appeals and the number of panels which can hear cases. The supreme court will, of course, retain the most important cases for itself.

The Massachusetts Supreme Judicial Court reaches the same result by a different route. It screens all appeals to the Appeals Court as a matter of discretion and judicial administration. "The genius of the new two-court appellate system is that, with minor exceptions, either court can hear or decide any case."³⁵ Appeals are filed in the Appeals Court, but staff attorneys attached to the Supreme Judicial Court review the briefs and other papers and report to a committee of three justices which cases are important enough for that court to transfer to itself. Two justices may order such a transfer before the case is heard in the Appeals Court, although three votes are needed to grant an application for review after an Appeals Court decision. All or a majority (of a panel) of the Appeals Court may also certify an appeal to the Supreme Judicial Court for direct review, but this is seldom done.

The only guidelines mentioned in the Massachusetts rules are those for applications by parties for direct review of a trial court by the Supreme Judicial Court. See Rule 11. The questions presented should be constitutional (state or federal), of first impression or novel, or "of such public interest that justice requires a final determination by the full Supreme Judicial Court." Whether or not an application for review has been filed, as a practical matter the Supreme Judicial Court accepts for direct review cases it believes it would be likely to accept for review after hearing below, thereby minimizing "the risk

³⁴South Carolina, by statute (S.C. Code of Laws, Secs. 14-8-200, 260), similarly provides that appeals from the trial courts are to be filed in the Supreme Court, which may then transfer to the Court of Appeals any cases except those over which the Supreme Court has exclusive jurisdiction. The Supreme Court's present practice is to retain all criminal appeals and to divide the civil appeals between itself and the Court of Appeals on the basis of the age of the case, not by the case's subject or type or by the importance of having the case decided by the highest court. Decisions of the Court of Appeals may be brought before the Supreme Court by petition for certiorari, which the Supreme Court may grant as a matter of discretion, taking into account the usual factors, such as public importance and conflict among appellate courts.

Thus, in contrast to the practice in Iowa, Oklahoma, Hawaii, Idaho, and North Dakota temporarily, the South Carolina Supreme Court does not screen every appealed case to decide which should be heard in the first instance by itself or by the court of appeals. This takes substantially less Supreme Court time at that stage of the appellate process. On the other hand, this system does not enable the Supreme Court to review initially the important cases, which would make it unnecessary for those cases to be heard by two appellate courts and would leave to the Court of Appeals cases which the Supreme Court is unlikely to accept for subsequent review.

³⁵D. Johnedis, *Massachusetts' Two-Court Appellate System in Operation*, 60 MASS. L.Q. 77, 78 (1975); *Massachusetts' Two-Court Appellate System; a Decade of Development*, 67 MASS. L. REV. 103, 106-110 (1982). Mr. Johnedis is Chief Staff Counsel to the Supreme Judicial Court of Massachusetts.

of delays caused by double appellate review." It also may accept whatever cases are needed to provide for "an equitable distribution of the appellate workload."³⁶ This procedure has resulted in the court hearing many more cases on direct review on its own motion than on applications of parties to review the decisions of the Appeals Court. From 1986 to 1987 the Supreme Judicial Court on its own motion transferred 119 cases to itself before argument in the Appeals Court and granted 65 out of 99 applications by a party for review before argument, but granted only 9 percent—26 out of 295—of the applications for review after argument.³⁷ This system assures an expedited hearing and a prompt authoritative decision of the most important issues, balances the workload as between the two appellate courts, and avoids double appellate review except in a small number of cases.

Connecticut has adopted substantially the same system. Roughly 50 to 60 percent of the Supreme Court's docket consists of cases transferred from the Appellate Court before briefing and argument, with 10 percent accepted for review following decision in the Appellate Court; the remainder are direct appeals to the Supreme Court from a trial court. The Connecticut Supreme Court believes that a transfer process which identifies the cases with important legal issues before they are briefed in the court below "allows both courts to function more efficiently by minimizing the number of double reviews undertaken through the certification process and by sparing the Appellate Court the time-consuming labor involved in deciding the most novel and complex legal issues."³⁸

Irrespective of the court in which the appeals are initially filed, in each of these states the decisions in the cases retained in or assigned to the intermediate court are subject to discretionary review by the high court. But the latter court has already sifted out and retained for direct review those cases deemed important enough for it to hear. A supreme court would be unlikely to accept for subsequent review many cases it found not important enough to hear in the first place, except when the decision of the intermediate court clearly presented an important question or a conflict for the first time.

The result is that not very many cases are accepted by the supreme courts on the petition of the losing party from the decision of the intermediate court. Thus, in Iowa the number of successful applications for review of Court of Appeals' decisions was 43 and 60 in 1985 and 1986.³⁹ But these cases constituted only 14 and 17 percent of the 304 and 344 cases decided by the Iowa Supreme Court on the merits in those years, in which the Supreme Court transferred 727

³⁶60 MASS. L.Q. at 80.

³⁷Information obtained from Mr. Johnedis. In addition, 69 appeals were taken directly to the Supreme Judicial Court.

³⁸Letter from Chief Justice Ellen A. Peters.

³⁹IOWA SUPREME COURT, ANNUAL STATISTICS REPORT OF THE STATE COURT ADMINISTRATOR 26 (1986).

and 552 cases to the Court of Appeals.⁴⁰ The Oklahoma Supreme Court, in fiscal year 1987, decided 864 cases by opinion, assigned 931 to the Court of Appeals, and accepted 56 petitions for certiorari to review decisions of the Court of Appeals. The Idaho Supreme Court in 1987 granted 7 out of 41 petitions to review decisions of the Court of Appeals. One hundred and eighty one cases were assigned to that Court by the Supreme Court and 254 retained in the Supreme Court.⁴¹

These systems avoid the time and expense of briefing and arguing an appeal in two courts except in the small number of cases which most of these supreme courts accept for review after decision by the intermediate courts. The preparation of additional briefs can be avoided by providing in the court rules that when a brief has been filed in the court below it should be filed in the supreme court along with the petition for review. That petition should be a short document explaining why the case is important enough for review by the higher court. It should include other material supplementary to the brief only if counsel deems that necessary. If review is granted, counsel should be encouraged to submit only a supplemental brief containing arguments or authorities not in or adequately presented in a prior brief or petition. Appellees should also be allowed to file a brief supplemental to the brief filed below.⁴²

Such a procedure, which is similar to the practice of a number of states now (see Secs. 6.7(a), 9.4, *infra*), would be needed only for the small number of cases which the supreme court would accept for review after first assigning them to the lower court. It should render the two appeals substantially less costly and time consuming for parties, counsel, and the courts, and thereby meet the major objections usually made to the use of a two-tiered appellate structure.

Such a system cannot work unless a supreme court is able to determine, without spending too much of its own time, which appeals are important enough for it to take over from the intermediate court. The cases below can be screened preliminarily by the judges of the court below (as in Florida), or by the supreme court's own staff attorneys (as in Massachusetts and Connecticut), with or without a request or petition from a party. Since such requests might be both numerous and unmeritorious, only those which the screeners deem likely to qualify for direct supreme court review should be submitted to the court itself.

The Massachusetts Supreme Judicial Court seems able to handle the burden, however, and Massachusetts is the twelfth most populous

⁴⁰*Id.* at 23-24.

⁴¹Letter from Clerk of Idaho Appellate Courts.

⁴²In Hawaii, if the Supreme Court accepts a decision for review, the case is decided on the record and briefs filed in the Court of Appeals. The Supreme Court may request additional briefs or grant a party's motion for leave to file a supplemental brief and may set the case for oral argument. Rule 3(e)(9). The court may impose restrictions on the length and time of filing of supplemental briefs and any responses thereto. A typical order granting certiorari will include a provision allowing each party 30 days in which to file a supplemental brief not exceeding 15 pages in length.

state. From 1986 to 1987, 1,706 appeals (with some overlap) were filed in the Supreme Judicial Court and the Appeals Court. The supreme courts of Iowa and Oklahoma, states with smaller populations, had similar caseloads.⁴³ Whether supreme courts in states with larger appellate caseloads could review even cursorily all the appeals to the intermediate appellate courts may well be doubted: only experience can determine where the numerical line should be drawn. Certainly the United States Supreme Court is unable to review all of the more than 35,000 appeals now taken to the United States courts of appeals. Indeed, a much less drastic proposal to authorize the Supreme Court to transfer cases of intermediate national importance to a national court of appeals has gotten nowhere.⁴⁴

The above analysis leads to the conclusion that many states with intermediate appellate courts could use the preliminary screening method for avoiding the delays and costs of two tiers of appeals for the great majority of cases. To do so they would not have to sacrifice any of the essential elements of fair appellate procedure—the right to present an argument addressed to the issues before the court both in writing and orally, and the obligation of the court to render a collegial decision explaining the reasons for its conclusions.

2.6 Remedies for Supreme Courts

The preceding discussion describes methods of coping with appellate workloads which some American courts already utilize, and which to a considerable extent enlarge the number of cases appellate courts can handle. Even those procedures should not be considered or adopted unless the existing appellate courts reasonably regard themselves as overburdened. Thus parties should not be required to litigate in two appellate courts instead of one unless that is necessary. And even if some change is needed, the least burdensome should be adopted. Nevertheless, as populations and caseloads keep growing, even the use of the prevalent system of two-tier appellate structures with discretionary review in the highest court will not be sufficient. This is already happening in the federal courts and the more populous states.⁴⁵

No single group of judges can handle an infinite number of cases, particularly when each judge participates in each decision, no matter how conscientious and brilliant the judges may be. Scholars have

⁴³In 1987, 2,329 cases were filed in the Oklahoma Supreme Court of which 931 were transferred to the Court of Appeals. In Iowa (in 1986) the total number of appeals filed was 1,246 (excluding appeals voluntarily dismissed). REPORT, *supra* note 39, at 1.

⁴⁴COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE 32-34 (1975), reprinted in 67 F.R.D. 195, 208-246.

⁴⁵The filings of new appeals in the appellate courts of the 10 most populous states ranged from 6,273 in New Jersey to 14,699 in California in 1982. See Table in B. Overton, *A Prescription for the Appellate Caseload Explosion*, 2 FLA. ST. U. L. REV. 205, 234 (1984).

estimated that an appellate court should not be called upon to handle more than 100 cases on the merits per judge per year.⁴⁶ In 1982, courts of last resort in four of the most populous states (New York, Pennsylvania, Florida, and the Texas Court of Criminal Appeals) published over 340 opinions. For the seven judges in the New York, Florida, and Pennsylvania courts, and the nine judges on the Texas court, this averaged almost 50 written opinions per judge per year in Florida and Pennsylvania, 66 in New York, and 41 in Texas.⁴⁷ These bare figures do not by any means reflect the number of cases on which each judge must work. Each judge is called upon to decide every case coming before the court, which means studying the briefs and records, attending the arguments, and joining in the conferences for all the cases. In addition each judge must pass upon a large number of petitions for review, most of which require much less time, of course, than cases decided on the merits after full briefing and oral argument. The number of these petitions in the most populous states runs into the thousands, which means that each judge must consider a substantial number each week.

Since the capacity of intermediate appellate courts can be enlarged by creating more judgeships, the serious caseload problem relates primarily to supreme courts. The number of trial and appellate judges from whom cases come to the supreme courts is rapidly increasing, and there is no reason to believe that the number of cases coming from the lower courts will, as a political or substantive matter, be reduced substantially. Since one group of judges working on every case cannot carry the load, bringing in other judges—whether as a separate court, division, or panel—to share the load has to be the solution. This can be done in a number of ways which are not mutually exclusive, each of which is reasonable enough to have been proposed by authorities who are knowledgeable even though they do not agree with each other. Of greater significance, each has been or will be opposed by a great many persons who can find good reasons for opposing any change. Thus there is little chance of any being accepted until there is a consensus among the judges and legislators of the state or nation not only that something drastic must be done, but upon what that should be.

The proposals for assistance to an overworked supreme court fall into three categories:

(a) The task of screening petitions for leave to have an appeal heard by a supreme court could be transferred, in whole or in part, either to a lower appellate court or to a newly created appellate court or panel of judges that would still be below the supreme court.

(b) A new intermediate appellate court immediately below the supreme court could have jurisdiction to hear appeals transferred to

⁴⁶P. CARRINGTON, D. MEADOR, AND M. ROSENBERG, *JUSTICE ON APPEAL* 143-146 (1976).

⁴⁷California has had fewer cases on the merits but over 4,000 petitions for discretionary review.

Intermediate Appellate Courts: Improving Case Processing

Final Report

Submitted to the State Justice Institute

by

National Center for State Courts

JOY A. CHAPPER
Co-Project Director

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April 1990

Executive Summary

The state intermediate appellate court (IAC) is a new, growing, and evolving institution. As recently as 1957, IACs existed in only 13 states. However, by the end of the 1980s, 37 states had permanent IACs, one state had a temporary IAC, and additional jurisdictions were considering creating them.

IACs are primarily courts of mandatory jurisdiction, hearing appeals of right filed from decisions of the trial court. Because few of their decisions are reviewed by the court of last resort, IACs are, in fact if not in law, the final arbiter of most cases. Despite the key role IACs play in maintaining the accountability of the trial court process, very little is known about them. The lack of systematic knowledge about these courts has important consequences. Without detailed information, individual courts cannot identify with precision where problems exist or what opportunities for self-improvement are appropriate.

This report provides information from the first comparative study devoted exclusively to IACs in an effort to address basic unanswered questions concerning their operations:

- *Caseload*: What do appeals look like? Do differences in jurisdiction affect caseload composition? To what extent do appeals wash out before being decided by the court? Is the attrition greater for civil than criminal appeals?
- *Procedure*: What steps in the traditional appellate process are modified? How are traditional procedures altered and for what kinds of cases? How do courts ensure that quality is preserved when modifications are introduced?
- *Case Processing*: Do particular stages of the appellate process, such as record preparation and briefing, take longer than other stages? Do the same patterns hold true for both civil and criminal appeals? Are particular case characteristics associated with the time that it takes to resolve

cases? Do procedures, such as oral argument and the publication of opinions, affect case processing time?

Four courts serve as research sites, providing data on appeals filed in 1986 and 1987. They are the Arizona Court of Appeals, Division One in Phoenix; the Florida Second District Court of Appeal in Lakeland; the Maryland Court of Special Appeals; and the New Jersey Superior Court, Appellate Division.

Ten essential findings from the four-court inquiry are highlighted below:

(1) Although the jurisdiction of IACs is primarily mandatory, study of the four courts indicates that there are considerable differences in the right of appeal, particularly from nontrial criminal matters, which result in some courts avoiding categories of appeals that constitute an appreciable part of the caseload of other courts.

(2) Despite differences in jurisdiction, the four courts are similar in caseload composition in terms of the areas of underlying civil law and the most serious criminal offense at conviction. The most striking aspect of the caseload composition is that the percentage of criminal appeals where the most serious offense is drug sale or possession is striking: 23 percent of the caseload in Florida and New Jersey and 16 percent in Arizona and Maryland.

(3) The volume of appeals filed or docketed overstates a court's actual workload as a sizable volume of appeals are dismissed or abandoned before they reach the court for consideration. A funnel-like case attrition occurs even where a court does not encourage the early resolution of appeals.

(4) The alteration of one or more of the basic steps in the appellate process is widespread, with some modifications (e.g., the submission on the briefs without oral argument and unpublished decisions) being seen in every court.

(5) The time consumed by the appeals process is not uniform across courts or within courts for criminal and civil cases. Nonetheless, criminal appeals generally take longer to reach perfection than civil appeals, and much of this difference is attributable to the time taken for the appellant to file an opening brief.

(6) In criminal appeals, the only factor consistently related to appeal time is the type of offense at conviction. Appeals from homicide convictions take the longest, followed by those from other crimes against the person, and then those involving all other offenses.

(7) In civil appeals, the underlying trial court proceeding is related to appeal time. Appeals from jury trials take the longest amount of time, followed by those from nonjury trials and all other proceedings. Areas of civil law (e.g., tort, contract, domestic relations) do not distinguish fast appeals from slow ones.

(8) The use of oral argument does not consistently affect appeal time for either civil or criminal cases. Instead, if courts are expeditious in handling cases at the stage between the close of briefing and argument or submission without argument, then they are expeditious for both argued and nonargued appeals.

(9) Publishing an opinion adds to decision time for both civil and criminal appeals.

(10) The principles of case management distilled from the trial court experience have clear parallels in appellate court case processing. However, these principles will not be applied fully until information systems are organized to provide information upon which appropriate management decisions can be based.

These findings have a number of implications for improving case processing by IACs. First, they reveal the importance of understanding context when making cross-court comparisons. Because differences in subject matter jurisdiction contribute to variations in caseload composition, affecting the extent to which appeals ultimately reach the court for decision, courts need to know how their context compares to that of others in determining whether a procedure used elsewhere will be appropriate or will require adjustment.

Second, the experiences of Arizona, Florida, Maryland, and New Jersey imply that traditional appellate procedures can be modified without affecting quality. However, special procedures need to be viewed in context to see what makes the modification feasible and how quality is maintained.

Third, although a potential problem confronting all courts is delay in the briefing of criminal appeals and, more specifically, the filing of the appellant's brief by an appellate defender, some jurisdictions have had success in treating resource shortages as management issues and have responded with procedures that enable them to maximize available resources. This includes counsel's active exploration with appellant of alternatives to an appeal and the court's adoption of procedures that eliminate or abbreviate brief writing, circumvent bottlenecks in the defender's office, and accelerate the court's consideration of certain categories of appeals.

Finally, one way for IACs to maintain greater accountability, monitor their performance more closely, and take necessary corrective measures is by obtaining systematic information on their operations and outcomes. The unavailability of information on caseload composition, attrition rates, and case processing time inhibits clear problem identification and choice of promising solutions.

Similarly, the transfer of innovative ideas and approaches across courts would be encouraged by comparative information on court procedures and the circumstances in which they are used. For example, although courts vary

widely in the frequency of *Anders* briefs (they are not recognized in Maryland and are filed in over half of all criminal appeals in Arizona), there is no systematic information on the procedures courts follow in these kinds of cases. Such comparative information is also lacking on "fast tracks," appellate settlement conferences, the use of staff attorneys, and other specialized procedures. Having systematic descriptive information would make innovative procedures more comprehensible and encourage their consideration. Thus, individual IACs should be assisted in enhancing their own management information systems and supported by research aimed at problems that are national in scope.

Understanding Reversible Error in Criminal Appeals

Final Report

Submitted to the State Justice Institute

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October 1989

Understanding Reversible Error in Criminal Appeals:

Executive Summary

One of the critical functions of appellate courts is to supervise the trial process, correcting errors by reversing or modifying decisions of the trial courts. Despite the importance of appellate review in assuring the integrity of the criminal appeals process, there has been virtually no systematic examination to determine the patterns of outcomes, either within or across courts.

Where do criminal appeals come from in terms of the trial court proceeding being challenged, the offenses involved, and the issues raised? What are the outcomes of criminal appeals? Are successful appeals associated with certain configurations of proceedings and issues? What kinds of errors are being made in the trial courts? Answers to these questions are essential to efforts to enhance the effectiveness of the trial process and to inform our understanding of cases on appeal. In response, the National Center for State Courts (NCSC) has undertaken a study of these questions with data collected from five state appellate courts hearing first-level criminal appeals.* The remainder of this paper highlights the essential aspects of that research. The significance of the research results for

* We looked at four intermediate appellate courts—the California Court of Appeal, Third District, in Sacramento; the Colorado Court of Appeals; the Appellate Court of Illinois, Fourth District, in Springfield; and the Maryland Court of Special Appeals—and one court of last resort in a jurisdiction without an intermediate appellate court (Rhode Island Supreme Court). In each, we looked at all defense appeals resolved on the merits within a set time frame—two years in Rhode Island (1983-1984) because of its small caseload and one year in each of the others (1983 in Sacramento and Springfield, 1985 in Colorado and Maryland). Original writs and government appeals were excluded, and discretionary appeals were included only to the extent that the court accepted an appeal for hearing on the merits. In every court, the docket and the court's decision document were examined; briefs were examined in all courts except Maryland. The data set consists of just under 1,750 appeals in which almost 3,800 issues were raised and considered by the appellate court.

judicial education and training is discussed in the following paper, "Identifying Reversible Error in Criminal Appeals: Implications for Judicial Education." Detailed research results on the composition and outcomes of criminal appeals are presented in the final paper, "Toward Understanding Criminal Reversals."

The Landscape of Appeals

At the most general level, the research confirms the utility of a comparative approach to understanding court operations and their improvement. Few striking differences emerge across the five courts in terms of the composition of appeals. The differences that exist can be largely explained by differences in each court's jurisdiction and underlying state law. For example:

Trial Court Proceedings. In each court, the majority of appeals follow trial convictions. However, on average, one-quarter of the appeals come from nontrial proceedings, including guilty pleas, revocations of probation, denials of postconviction relief, and a handful of miscellaneous proceedings. Where state law permits direct appeals from pleas of guilty and denials of postconviction relief, their numbers can be quite large (e.g., over 40 percent of the appeals in Sacramento followed guilty pleas).

Most Serious Offense. Homicides and other crimes against the person constitute just over half of all appeals; 20 percent consist of property crimes. There is relatively little variation from this distribution across the five courts.

Sentence. The large plurality, if not majority, of appeals in each jurisdiction is in cases with sentences of five years or less. Sentences in excess of 20 years are seen, on average, in less than 20 percent of the appeals.

Issues Raised. The frequency with which issues were raised is quite similar from court to court. In appeals following jury trials, the most frequent challenges are to rulings on the introduction of evidence or testimony (43 percent), sufficiency of the evidence (35 percent), and jury instructions (30 percent).

Counsel. One of the most visible differences across states is in the structure of defense representation. The courts vary in the extent to which a public

defender provided indigent defense representation and in the frequency of retained counsel.

Winning and Losing on Appeal

The conventional wisdom is that with free appeals there is little incentive not to appeal, and, as a result, a large number of criminal appeals are meritless, if not frivolous. Given that perspective, one might not expect to find a great many successful appeals. In fact, the overall affirmance rate for the five courts is 79.4 percent. Four of the courts (all but Rhode Island) are within plus-or-minus two percentage points of that figure (78.6, 79.3, 79.3, and 81.7 percent); Rhode Island's affirmance rate was 70.8 percent.

As seen in Table 1, instances in which a conviction or judgment were overturned and the case either remanded for a new trial or the charges dismissed were quite infrequent. Acquittals constituted only 1.9 percent of all appeals and only 9.4 percent of all nonaffirmances or "winners." In no jurisdiction did acquittals occur in as many as 4 percent of all appeals. A remand with the possibility of retrial was more likely—6.6 percent of all appeals and 31.9 percent of all winners.

Defendants had the most success in obtaining a new sentencing hearing or a corrected sentence entered by the appellate court. These constitute 7.3 percent of all appeals and 35.3 percent of all winners. Defendants obtain some relief in an

Table 1
Percentage Distribution of Alternative Outcomes
Five-Court Pattern

Appeal Outcomes	Percent all Appeals	Percent Nonaffirmances
Affirmed	79.4	—
Reversed	20.6	100.0
Acquittal	1.9	9.4
New trial	6.6	31.9
Resentencing	7.3	35.3
Other	4.8	23.4

additional 4.8 percent of the appeals; many of these are appeals with multiple convictions where at least one conviction is affirmed.

What Accounts for the Outcomes?

The literature suggests a number of factors to explain outcomes—including the trial court proceeding (trial versus nontrial), the type of offense or the seriousness of the sentence, and the type of defense counsel. However, the five-court data show no strong relationship between these factors and appeal outcomes. There are essentially no differences in outcomes between appeals from trials and those from nontrial proceedings. Appeals from each type of proceeding win about the same in total, with trials winning somewhat more frequently.

Although frequency of winning does not appear to vary greatly by offense, the relationship between sentence and outcome is more complicated. Specifically, appeals at each end of the incarceration spectrum (those with little or no incarceration and those with sentences in excess of 20 years) show the lowest affirmance rates. "Winning big" (i.e., an acquittal or a new trial) occurs most frequently in appeals with the least serious sentence; appeals involving the longest sentences show the highest percentage of "winning little" (i.e., resentencing or other modification). Yet these relationships are very weak statistically. That is, while there is a gross difference in the affirmance rates between appeals involving long versus shorter sentences, one cannot predict whether a case will be affirmed or reversed by looking at its sentence length. Similarly, there is virtually no difference in outcome by counsel.

Issues, Error, and Outcomes

Much more closely related to outcomes is the nature of the issues raised on appeal. As seen in **Table 2**, the appeals courts identified 267 prejudicial errors affecting other than the sentencing hearing or the sentence in jury trial cases. Quantitatively, just over 20 percent of the errors related to rulings on the admission or exclusion of evidence; instructions accounted for 13.5 percent, sufficiency of the evidence 12 percent. However, as **Table 2** also indicates, some issues are more successful than others in resulting in reversible error.

The "success rate" among different issues can be estimated by dividing the number of times a particular type of error is found by the total number of times the issue is raised. According to **Table 2**, the success rate appears in large measure to

be inversely related to the relative frequency with which an issue is raised. That is, the most frequently raised issues have lower error rates than less frequently raised ones.

Substantively, error seemed to fall into three broad categories, although specific case precedents differ from court to court. Those categories are:

- perennial problems arising from the context in which they are raised. Evidentiary questions raised during the examination of witnesses at trial are a classic example.
- issues that result from new areas of litigation. Trial judges have problems with new areas until law and procedure become settled. Where these problems will occur is hard to predict, but when they occur they exist across courts with each jurisdiction having wrinkles on the basic theme. This is seen in sex offenses involving child victims where every jurisdiction has reversals as a result of the trial judge's decisions permitting testimony on the veracity of the child victim. Another example involves questions regarding the admissibility of roadside sobriety tests in prosecutions for driving under the influence or driving while impaired.

Table 2
Reversible Error by Issue

Issue	Percentage of all Error Associated with Issue	Success Rate
Admission/exclusion of evidence	20.6%	7.7%
Instructions	13.5	9.7
Procedural or discretionary ruling	13.1	7.8
Sufficiency of the evidence	12.0	5.8
Merger of offenses	10.5	51.9
Suppression of evidence, statements, or identification	10.5	8.4
Ineffective assistance/waiver of counsel	6.0	12.9
Other constitutional claims (double jeopardy, speedy trial)	4.9	11.5
Jury selection or deliberation	3.4	8.8
Statutory interpretation or application	2.2	19.4
Plea	2.2	15.0
Prosecutorial misconduct	1.1	1.9
	100%	
	N=267	

- inattention or lack of deliberation. Error in many instances appeared less the result of the idiosyncratic nature of state law than of the trial judge's failure to follow established rules or procedures. These included the failure to afford allocution before sentencing and to provide notice before a revocation hearing.

An Emerging Issue—Sentencing Error

The research reveals a growing trend that warrants separate treatment. This is the emergence of sentencing issues as a problem, regardless of the jurisdiction's particular sentencing law. Sentencing issues were raised in one-quarter of the appeals, and it appears that sentencing issues are not simply "add-on" issues to appeals that would otherwise have been filed; a great number of appeals were filed raising only sentencing issues. In addition, sentencing issues have a high error rate. In fact, when sentencing is raised, the courts find error 25 percent of the time.

The appeals raised a wide range of issues relating to the sentence and the sentencing hearing, not simply disparity claims. Sentencing issues included enhancements (aggravating factors warranting a departure from the guidelines or the computation of the time enhancement); mitigating factors; the imposition of consecutive as opposed to concurrent terms; problems with the conduct of the sentencing hearing, including the denial of allocution; and the trial judge's illegal considerations (e.g., pleaded not guilty). Although the nature of the error differed across the five courts, even in Rhode Island, which has indeterminate sentencing, sentencing issues had a 38.5 percent error rate.

Where Do We Go from Here?

Need for Monitoring

The fundamental importance of the outcomes of criminal appeals calls for individual appellate courts to monitor their own performance for internal feedback purposes and to enhance their role in supervising the trial process. A significant by-product of this monitoring would be the ability to track issues in the appellate court.

Need for Information

Without systematic information, the appellate court can neither perform its internal monitoring function nor supervise the trial court process effectively. For this reason, the administrative office of the state courts and the appellate court staff

need to incorporate information on the outcomes of criminal appeals and the characteristics of the appeals (lower court proceeding, offense, sentence) into their management information systems.

Need for Education

Because one in every four appeals finds error, there is room for improving trial court performance. Perhaps not every error can be averted, but there is evidence that an appreciable portion of the error is reducible.

The methodology used in the current research can be used by individual states to assess their particular needs for judicial education. In addition, the use of a common methodology and uniform categories can shed light on relevant similarities and differences in error patterns, suggesting possible ways to avoid or reduce error as well as highlighting mutual areas of concern.

THE VIEWS EXPRESSED HEREIN
REPRESENT ONLY THOSE OF THE
SPECIAL D.C. COURT OF APPEALS
STUDY COMMITTEE OF THE D.C. BAR
AND NOT THOSE OF THE D.C. BAR
OR ITS BOARD OF GOVERNORS

REPORT AND RECOMMENDATIONS

to the

BOARD OF GOVERNORS OF THE DISTRICT OF COLUMBIA BAR

of the

SPECIAL COMMITTEE TO STUDY
THE DISTRICT OF COLUMBIA COURT OF APPEALS

An In-Depth Study of the
Intermediate Court of Appeals Issue
and Other Proposals for Dealing With
the Workload and Reducing the Backlog
of the D.C. Court of Appeals

With Dissenting Views

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REPORT: COURT STUDY COMMITTEEI. Introduction.

The Court of Appeals Study Committee was created by Resolution of the Board of Governors of the D.C. Bar, acting at the suggestion of then-Chief Judge William C. Pryor. The Resolution "approve[d] the concept and creation of a special committee to look at the Intermediate Court of Appeals issue as well as alternative methods of dealing with the workload problems of the courts."^{1/} That Resolution was translated into a directive to the Committee "to study the Court and make recommendations as to its future evolution in terms of structure, staffing and mission." To that end, the Committee determined to undertake the following activities:

- (1) To study the structure, workload and internal operating procedures of the District of Columbia Court of Appeals;
- (2) To assess the substance and seriousness of the Court's current backlog and determine its causes and contributing factors;
- (3) To review previous studies of this and other similar Courts;
- (4) To consult with present and former judges, staff and support personnel, agencies and attorneys frequently appearing before the Court, and leaders of the Bench and Bar; and

^{1/} See Minutes of the July 14, 1987 meeting of the Board of Governors of the District of Columbia Bar at 3-4.

(5) To formulate recommendations to achieve an orderly reduction of the Court's present backlog in the shortest feasible time and to prevent its recurrence.

The Committee has made a concentrated effort to explore all reasonable proposals for dealing with the problems of workload, decisional delay and backlog, including, but by no means limited to, the advisability of creating an intermediate appellate court.

In our judgment, an intermediate appellate court should be established for the District of Columbia. The present workload of the Court of Appeals appears to be such that no reasonable alternative means are available which would allow the Court to dispose of cases brought to it in a timely fashion without unacceptable sacrifices in the quality of the Court's work, increased risk of decisional inconsistency, and continued inability to hear more than an insignificant number of cases en banc. It is, moreover, the Committee's view that a mere increase in the number of full-time judges devoted to appeals would not allow the Court both to deal with its workload problems, on the one hand, and to assure the quality of the process, on the other.

The experience of other jurisdictions with the problem of structuring their appellate judiciary to accommodate growing caseloads demonstrates that the best and most efficient way of organizing that judiciary is in two tiers, with most cases being decided by three-judge panels in an "intermediate" appellate court and cases that are of greatest significance to the law of

the jurisdiction being decided by a highest court that sits en banc.

The Committee has reviewed, and is deeply indebted to, the considerable efforts others have previously made to study and assess the appellate process in the District. These include the 1977 "von Kann Report" examining the extent of the Court's compliance with the ABA Standards of Judicial Administration Relating to Appellate Courts;^{2/} the "Douglas Report" recommending that an intermediate appellate court be established;^{3/} the 1980 "Horsky Report" which recommended that alternatives to an intermediate court be attempted over a five-year period, including adding three judges to the Court of Appeals in an effort to ascertain whether its backlog could be eliminated;^{4/} and the 1986 National

2/ Report to the District of Columbia Judicial Planning Committee from the Subcommittee to study the extent to which practice and procedure of the D.C. Court of Appeals conforms to the Standards. The District of Columbia Court of Appeals and the A.B.A. Standards of Judicial Administration (1977) (hereinafter, "von Kann Report," after the Subcommittee Chairman Curtis E. von Kann).

3/ Subcommittee on the Workload of the District of Columbia Court of Appeals, District of Columbia Judicial Planning Committee. District of Columbia Court of Appeals: Workload Problems and Possible Solutions (1979) (hereinafter, "Douglas Report," after the subcommittee chairman John W. Douglas).

4/ District of Columbia Court System Study Committee of the District of Columbia Bar, Appeals Court Report (1980) reprinted for use of the Senate Committee on Government Affairs, 98th Cong., 1st. Sess. (S. Prt. 98-34) (U.S.G.P.O., 1983) (hereinafter "Horsky Report" after the Committee's Chairman, Charles A. Horsky).

Center for State Courts Report, recommending that serious consideration be given to creating an intermediate court.^{5/}

In addition, the Committee has had the benefit of the recent efforts of the Bar Association of the District of Columbia. In 1987, the Board of Directors of the Association, acting on written reports and recommendations from its D.C. Court of Appeals Committee, chaired by S. White Rhyne, a member of this Committee, adopted a resolution urging establishment of an intermediate court with mandatory appellate jurisdiction, and conversion of the jurisdiction of the highest court from mandatory to discretionary. This Committee reviewed the material developed by the Bar Association, considered the views it expressed, and is indebted to it for its efforts in studying the problem.

The Committee has also reviewed what has taken place in Congress. Four bills to create a two-tier appellate system in the District of Columbia have been introduced in Congress in the last few years.^{6/} Hearings have been held on one of them.^{7/}

After reviewing the studies, the congressional hearings, and other materials concerning the D.C. Court of Appeals, the Commit-

5/ Southeastern Regional Office, National Center for State Courts, Appellate Delay in the D.C. Court of Appeals, (1986) (hereinafter referred to as the "National Center for State Courts Report", or "NCSC Report").

6/ H.R. 152, 100th Congress, 1st Session (1987); H.R. 4366 and 5541, 100th Congress, 2nd Session (1988); and H.R. 167, 101st Congress, 1st Session (1989).

7/ Hearings on H.R. 4366 before the Judiciary Subcommittee of the House of Representatives Committee on the District of Columbia, held April 19 and 28, 1988.

tee interviewed each of the judges and senior judges of the Court of Appeals, the clerks of the Court of Appeals and the Superior Court, judges of other courts, and numerous counsel possessing special interest and expertise in the Court of Appeals' functioning.^{8/} Finally, the Committee examined closely statistical measures of the Court's work.^{9/}

In testing the conclusion that the best way to ensure adequate and timely disposition of appeals is to establish an intermediate appellate court, we considered very seriously the objection that such a court might only produce another, different source of delay: that it would become "just another step" in litigation.

To avoid that result, we are recommending that the highest court of the jurisdiction be empowered to determine in the first instance what cases should be heard by the intermediate court, and what cases the highest court should hear directly. We believe that this mechanism will minimize duplication of effort.

The Committee also took very seriously the expense involved in creating another court. The ultimate question, however, is whether that expense should be borne to provide those who depend on the District of Columbia Courts with the same quality of justice afforded elsewhere, or whether they will be relegated to a system of appellate justice which cannot, in the long run, assure

^{8/} Those interviewed are listed in Appendix A.

^{9/} See the workload Statistics in Appendix B.

timely justice of that high quality. Should the expense of creating an intermediate court prove to be too high, means for mitigating that expense could be explored.

We also recommend that forceful steps be taken to ensure that transcripts are timely produced. First, the highest court of the jurisdiction should be charged with administering the court system. Second, reporters should be directed to use computer-assisted transcription (C.A.T.).

II. The Problem.

The workload problem of the Court can be measured in several ways, but under any criterion, the Court cannot keep up with its docket. Over the past decade, two unmistakable trends have emerged: first, the Court is being asked to hear more cases; and second, despite Herculean efforts by the judges, the time required from filing of a notice of appeal to decision is increasing inexorably.

-- Over the last decade, the number of cases filed has risen from approximately 1300 to 1700 cases per year. More cases are now pending in the Court than ever before (2347 pending cases in 1988, versus 1109 in 1978), and there have been only two years since 1980 in which the Court disposed of more cases than were filed (in 1983 and in 1987).

-- The Court is also finding it harder to dispose of cases in a timely manner, and it now takes nearly two years on average for a case to move from notice of appeal to final decision. In

1988, an average of 679 days (or 22.6 months) elapsed between filing a notice of appeal and the issuance of a final decision; in 1978, the average elapsed time was 472 days (15.6 months).

Throughout this time, the productivity of the Court, as measured in case dispositions, has actually improved. During the late 1970s, the Court was issuing between 600 and 700 opinions, both published and unpublished, each year. During virtually every year since 1982, the Court has handed down approximately 800 published and unpublished decisions annually.

This increased productivity largely reflects an increase in the use of unpublished opinions. Since 1976, the Court's published opinions have fluctuated within a rather constant range, at approximately 300 opinions each year, averaging between eight and eleven pages each. By contrast, the number of unpublished opinions has increased dramatically. Unpublished decisions (Memorandum Opinions and Judgments or "MOJs") rarely reached 400 a year prior to 1980. Since 1982, the Court has usually issued 500 unpublished opinions each year.

In analyzing delay and backlog in the Court's docket, the Committee focused on the four critical areas of each appeal and, using statistics provided by the Clerk's office, examined the Court's performance today vis-a-vis its performance ten years ago. This analysis is crucial because it helped to pinpoint where the problem areas are at each step of the appellate pro-

cess and suggests where reform efforts should be targeted. The four key areas and the trends in each are as follows:

1. The time between filing a notice of appeal and transmission of the record. This period has more than doubled over the past decade. In 1978, it took an average of 124 days to get the record filed; in 1987, it took an average of 256 days to accomplish the same task. In 1988, this figure decreased somewhat to 227 days, still nearly 7-1/2 months. This delay is wholly unacceptable, and the Committee is unanimous in its recommendation (discussed below) that significant reforms in court administration must be promptly undertaken regardless of one's views on the need for an intermediate court of appeals.

2. The time between transmission of the record and completion of the briefing. In 1978, it took an average of 134 days, or 4.5 months, for the parties to brief a case. In 1987, the figure had risen slightly to 157 days, or 5.2 months. 1988 witnessed a dramatic lengthening in this stage of the appellate process, to 237 days or nearly 8 months. In part, this increase may be attributable to an inclination by some lawyers to seek extensions of time because they know that the Court will not be able to hear a case promptly even if the briefs are timely filed. Indeed, we are advised by the Clerk's Office that the 2-1/2 month increase between 1987 and 1988 was caused in large part by the Court's reluctance to deny extension requests when it would not be able to hear the cases promptly in any event. Additionally, these delays generally may reflect the fact that

the Court's rising caseload has fallen disproportionately on the shoulders of institutional litigants such as the U.S. Attorney, the Public Defender Service, and the Corporation Counsel, each of which may have to seek extensions because of limited staff resources.

3. The time between filing the last brief and the date of oral argument or submission. In 1978, this process took an average of 93 days, or 3.1 months. The delay has grown steadily since then to an average of 127 days, or 4.2 months, in 1987. This increased to 152 days -- over 5 months -- in 1988. This trend is significant because it shows that the number of "ready" cases in the pipeline is growing at a faster rate than the Court can handle, despite the use of a variety of devices to conserve judicial time, such as submission of cases without oral argument and a 25 percent increase in the number of dispositions by MOJ.

4. The time between argument or submission and decision. This process took an average of 121 days, or 4 months, in 1978 and an average of 107 days, or 3.6 months, in 1987. That figure is slightly higher than the average in the 1983-1986 time frame and generally lower than the disposition time between 1975 and 1982. In 1988, this figure dropped to 76 days or 2½ months.

At first glance, these figures seem heartening because they suggest that the Court is able to keep up with its caseload once a case is presented to a three-judge division for decision. As we discuss below, however, this statistic is misleading because it lumps together the disposition rate for unpublished decisions,

which the Court decides very quickly, with published decisions, which average over eight months.

What conclusions can be drawn from these statistics? The first three areas measure how long it takes a case to reach a three-judge panel for decision, and the overall trend is not encouraging. The average time that it takes a case to move from notice of appeal to argument or submission has increased substantially over the past decade, from approximately 11½ months in 1978 to over 20 months in 1988. This situation is intolerable, and the Committee supports various administrative measures, such as speedier preparation of transcripts, in order to reduce the delay during this stage of the appellate process.

Superficially, administrative reform might appear to be all that is needed because the statistics suggest that once a case reaches a panel, the Court can dispose of cases as quickly now as ten years ago. Such a conclusion would be in error, however, because on closer examination, there are significant delays during the disposition phase as well as during the pre-argument phase, a fact which argues for more judicial resources in addition to administrative reforms.

As noted previously, the Court of Appeals took an average of 107 days to decide a case in 1987, the only year for which the comparable data for published opinions vis-a-vis MOJs has been

compiled.^{10/} What this figure masks, however, is the fact that the Court takes considerably less time to issue an unpublished MOJ than it does to produce a written opinion, yet the 107-day figure is an average for both types of dispositions. If one separates out the disposition rate for MOJs from that for published opinions, a different picture emerges.

The Court does an excellent job of disposing of cases by MOJ in a matter of days or weeks. The Committee examined the 511 MOJs that were filed in 1987 and calculated that they were disposed of in an average of 23.8 days each, well below the overall average of 107.^{11/} On the other hand, it took the Court an average of 254 days -- or roughly 8-1/2 months -- to decide the 296 cases in which a published opinion was deemed necessary.

The data strongly suggest that something similar occurred in 1988. For while the average time from submission to decision was reduced by a month (from 107 to 76 days), the number of published decisions (249) was at a 7-year low, while the number of disposi-

10/ The Committee is indebted to committee member Alexander H. Stevas, who undertook the considerable burden of compiling this data by hand, examining each of the decisions themselves and referring, as necessary, to the actual case files.

11/ If anything, this figure is somewhat inflated because it includes 23 cases which took over 100 days to decide. If one deletes these cases from the calculations, the remaining 488 cases were decided in an average of 15.8 days apiece, broken down as follows: 379 criminal cases, 15.8 days; 48 civil cases, 19.2 days; 43 agency cases, 13.6 days; other cases, 13.2 days. Additionally, cases which were submitted on the briefs and not argued orally generally took three to ten days less time to decide than argued cases. (This analysis does not include 8 disciplinary matters disposed of by MOJ for which disposition time could not be determined.)

tions by MOJ remained relatively constant. These statistics suggest that the overall reduction in disposition time is attributable to the fact that there were nearly 50 fewer cases decided by published opinion in 1988.

To be sure, there are difficult cases which require careful consideration and contemplation. Nonetheless, the fact that it takes an average of over eight months for the Court to issue a published opinion suggests that the Court's overall workload is affecting its ability to decide significant, law-declaring cases in a timely manner. And from a litigant's standpoint, it is surely disheartening to wait 18 months for one's case to be heard and another 8-1/2 months for a decision, a total of nearly 2-1/4 years on average.

There is something wrong systemically when an appellate court takes that long to dispose of cases. Regardless of how many administrative reforms are introduced to speed cases through the pipeline or to induce settlements, the fact remains that there is a finite limit to the judicial resources which are available to handle a caseload which has grown dramatically over the past decade. Even if a judge largely delegates to a law clerk the responsibility for preparing draft MOJs pursuant to the judge's direction, the judge must still read the briefs and records in each and every case and reach a conclusion about how the case should be resolved. The time spent on these responsibilities, as well as all the other rulemaking and administrative duties with which the Court is charged, inevitably takes its toll

in the Court's ability to carry out its doctrinal, law-declaring functions in an efficient manner.^{12/}

Our interviews with the judges clearly showed that the court's workload has also affected the quality of its decisions. Many published decisions are essentially the product of one judge. The amount of input from other (non-writing) judges on a case varies, but the time any judge can spend on opinions which others are assigned to write is limited. As a consequence, decisions in law-declaring cases are usually the product of only a few judges. Two judges can determine the law of the jurisdiction, and in practice, the law in any given case is largely shaped by the judge who is entrusted with writing the opinion.^{13/} § 3.01 of the ABA-Approved Standards Relating to Appellate Courts (ABA Standards-Appellate Courts) characterizes this as highly undesirable.

The Court of Appeals plays a role comparable to that of a state supreme court. It is responsible for interpreting District

^{12/} In this regard, it should be noted that the Court of Appeals regulates admission to the Bar; prescribes rules of conduct for those it licenses to practice; oversees attorney discipline; and polices unauthorized practice. See D.C. Code § 11-2501 (1981). In addition, the Court must approve changes to the procedural rules of the Superior Court which modify the Federal Rules of Civil Procedure. See D.C. Code § 11-946 (1981).

^{13/} This problem may be compounded by the practice of tentatively (albeit, randomly) assigning a member of the division as the writing judge prior to argument. See Paragraph VII(B) of the Court's Internal Operating Procedures (1985 ed.). Many observers argue that the collegial process is better served by assigning cases after oral argument, when all members of the division have had an opportunity to assess the relative merits of all the cases heard during that sitting.

of Columbia statutes and for declaring the law to be applied in District of Columbia courts, and its decisions can be reviewed only by the U.S. Supreme Court. D.C. Code § 11-102 (1981); 28 U.S.C. § 1257. The Court of Appeals is highly unusual, however, in that it performs this function by three-judge panels, whereas state supreme courts ordinarily decide cases sitting en banc. The difference is vitally important. As § 3.01 of the ABA Standards emphasizes, a court which performs a law-declaring function should decide cases en banc in order to reduce the danger of inconsistent precedents, always a possibility when a court performs its work by panels. In addition, en banc review assures that the result in any particular case will be less influenced by the identities of the judges assigned to hear it. It requires decisions to be reached through the collegial process that is the hallmark of appellate courts, with the views of all members of the court reflected in the final opinions.^{14/}

Of course, there are mechanisms in the present system intended to assure consistency between division decisions and to maximize participation by all members of the Court in important law-declaring cases. These are the provision for en banc argument and the "five-day rule" under which draft division opinions are circulated to all members of the Court for comment prior to

^{14/} We acknowledge that federal circuit courts routinely sit in panels to decide cases. As we discuss more fully below, however, the analogy to the circuit courts is inapt here because the law-declaring function with respect to federal law ultimately resides in the U.S. Supreme Court.

publication. Based on our interviews with members of the Court, however, neither mechanism is achieving the goals of consistency and collegiality in the decision-making process to the desirable and appropriate extent.

First, individual members of the Court stated that workload constraints prevent them from hearing more than ten or so cases en banc each year, thus ruling out a fair number of other cases raising issues they believed were otherwise important enough to be considered by the full Court.^{15/} They indicated that, as a practical matter, en banc review is limited to cases where it is absolutely imperative, and those represent only about one-third of the cases deemed to merit en banc review. The view was also repeatedly expressed that where judges can "live with" or "write around" a particular panel decision, they are likely to vote against rehearing en banc.

Second, with respect to the five-day rule, our interviews disclosed that individual judges have varying views about the proper role of a judge who does not sit on a case, but who is presented with a draft opinion for comment. In some instances, a judge will provide extensive comments and may challenge the reasoning used or the result obtained by the division. In other situations, a judge (or a judge's law clerk) will simply check

^{15/} The number of cases heard en banc from 1982 to 1988 has been: 1982-12; 1983-6; 1984-6; 1985-5; 1986-10; 1987-11; 1988-11.

the opinion to make sure that there are no inconsistent cases about to be issued from his or her chambers.

The five-day rule can perform a valuable function in preventing different divisions of the Court from directly contradicting each other in separate cases, but this mechanism is of quite limited utility (and desirability) insofar as the law-declaring function of the Court is concerned. Should a particular case raise challenging legal issues that excite the interest of judges who were not sitting on the division, the litigants and the public are best served by having those members of the Court, and indeed all members of the Court, read the briefs, review the record, and hear oral argument before a decision is actually rendered. Written comment from non-division members is a very poor substitute for fully informed consideration by all members of the Court. The Court's current workload severely limits the number of cases where such informed consideration by the full Court is practicable.

While predictions are chancy, it is difficult to see how the demands on the Court could be expected to subside. A number of complex statutes enacted fairly recently can be expected to gen-

erate significant numbers of appeals.^{16/} More civil appeals will also inevitably result from new common law theories,^{17/} and the trend toward litigating federal civil rights claims in the local

16/ For example, the Council of the District of Columbia has enacted complex statutory schemes for the protection of the mentally retarded, nursing home residents, and the incapacitated. See the Mentally Retarded Citizens Constitutional Rights and Dignity Act of 1979, D.C. Law 2-137. §§ 6-1901 et seq. (1981); the Nursing Homes and Community Residence Facilities Protections Act of 1985, D.C. Law 6-138, D.C. Code §§ 32-1401 et seq. (1988 repl. vol.); and the District of Columbia Guardianship, Protective Proceedings and Durable Power of Attorney Act of 1986, D.C. Law 6-204, D.C. Code §§ 21-2001 et seq. (1988 cum. supp.). The Council has repealed prior workers' compensation legislation in the District and enacted a significantly different scheme, which has been generating scores of new appeals. See the District of Columbia Workers' Compensation Act of 1979, D.C. Law 3-77, D.C. Code §§ 36-301 et seq. (1988 repl. vol.). The Council has also enacted several new regulatory schemes likely to generate significant litigation. See, e.g., the District of Columbia Taxicab Commission Establishment Act of 1985, D.C. Law 6-97, 40 D.C. Code §§ 40-1701 et seq. (1986 repl. vol.) and the District of Columbia Alcoholic Beverage Control Reform Amendments Act of 1986, D.C. Law 6-217, D.C. Code §§ 25-101 et seq. (1988 cum. supp.). It has enacted complex legislation to govern employment and contracting by the District of Columbia government. See the District of Columbia Government Comprehensive Merit Personnel Act of 1978, D.C. Law 2-139, D.C. Code §§ 1-601.1 et seq. (1987 repl. vol.) and the District of Columbia Procurement Practices Act of 1985, D.C. Law 6-85, D.C. Code §1-1181.1 et seq. (1987 repl. vol.).

In addition, significant litigation will in all likelihood result from laws the electorate has adopted directly, such as the District of Columbia Right to Overnight Shelter Initiative Act of 1984, D.C. Law 8-146, D.C. Code §§ 3-601 et seq. (1988 repl. vol.). Much litigation has already resulted from the Child Support Guidelines, 115 Wash. D. L. Rptr. 2269 (Oct. 27, 1987), adopted pursuant to congressional legislation, namely Pub. L. 99-573, 100 Stat. 3228 (1986), codified at D.C. Code § 11-1732(j)-(4)(A) (1988 cum. supp.)

17/ See, e.g., Sandoe v. Lefta, No. 86-1506 (Dec. 15, 1988); Nelson v. Nelson, 548 A.2d 109 (D.C. 1988); District of Columbia v. Peters, 527 A.2d 1269 (D.C. 1987); Boykin v. District of Columbia, 484 A.2d 560 (D.C. 1984).

courts.^{18/} The increase in drug-related crime and its attendant violence is certain to lead to more litigation, and more appeals, on the criminal side of the docket.

In sum, the Court of Appeals cannot function acceptably and keep its docket current, much less reduce the tremendous number of cases in its backlog, without some form of relief.

III. Proposed Solutions.

A. Reducing the Number of Appeals.

The Committee studied the system used by the Supreme Court of New Hampshire, whereby litigants must in essence persuade the Court to review their cases. This system amounts to one in which the only appellate court has discretionary power to refuse review. The Committee believes that neither the bar nor litigants in the District would accept such a system. There are strong arguments against doing so.

As stated in the Commentary to § 3.10 of the ABA Standards-Appellate Courts, "[t]he right of appeal . . . is a fundamental element of procedural fairness as generally understood in this country." For that reason, § 3.10 provides that litigants should have a right to appeal except in cases involving minor matters, and that this right should involve, among other things, "thought-

^{18/} See, e.g., Henderson v. District of Columbia, 493 A.2d 982 (D.C. 1985); Fisher v. District of Columbia, 498 A.2d 198 (D.C. 1985) vacated 591 A.2d 28 (1986) remanded with instructions to dismiss as moot, 514 A.2d 801 (1986).

ful consideration of the merits by at least three judges of the Court."

The Douglas Report rejected the approach of restricting appeals as of right and substituting a procedure, similar to that then in use in Virginia, in which the high court's jurisdiction was essentially discretionary. Douglas Report at 103-104. It did so principally because "the efficiency [of the Virginia system] has been achieved at a price to litigants in the quality of appellate justice which most Americans and their lawyers would or should be unwilling to bear." *Id.* at 104, quoting P. Carrington, D. Meador and M. Rosenberg, Justice on Appeal 133 (1976). Virginia has since itself significantly modified its former system in which litigants had essentially no right of appeal, but only an opportunity to petition for review.

B. Increasing Non-Judge Resources.

It is clear that increasing the number of law clerks or court-employed counsel cannot, without more, solve the Court of Appeals' workload problem. The crux of that problem, according to the judges, is that there is not enough "judge-time" available; there are simply too many cases on the docket for the judges to devote adequate attention to them. In too many cases, the law is declared essentially by one judge. En banc review is not possible in more than a handful of cases each year. In the opinion of some of the judges, there is already too much delegation to staff counsel and law clerks on motions and cases that do not involve published opinions.

There are powerful arguments that these judicial functions should not be delegated to non-judges, particularly to those who have limited legal or other experience. Perhaps to counter the argument that some cases simply are not worth much attention, the introduction to the ABA Standards-Appellate Courts states:

[I]t is important to emphasize that the quality of appellate justice is to a large degree determined by that attention given to the merits of cases that are of little interest to anyone but the immediate parties. All appellate courts should remain mindful that every case, whether it has general importance or not, is important to the immediate litigants.

This does not mean, however, that some additional legal-trained court staff should not be employed. In some circumstances (if, for example, the court of last resort were to screen cases to determine whether they ought to be taken for immediate review or sent to the intermediate court), additional staff counsel would significantly enhance efficiency. See n.28, infra below.

It has also been suggested that hiring experienced counsel as commissioners to perform functions such as narrowing issues and promoting settlements may substantially reduce the backlog. However, recent experience in having senior judges undertake such functions has revealed that they are likely to be of limited assistance in relieving the judges of having to decide cases.^{19/}

^{19/} The Clerk's office informs us that, in 1988, 71 cases were selected for such settlement conferences, and that only 7 of them

Footnote continued

C. Temporary Expedients: Senior Judges, Temporary Judges.

A number of temporary expedients have been suggested to enable the Court of Appeals to cope with its workload problem. It has been pointed out that the State of Arizona used "temporary judges" -- i.e., private counsel appointed as judges for limited terms -- to reduce its backlog problem.^{20/} Another suggestion was that more intensive use of senior judges, coupled with the use of several experienced counsel as commissioners, might suffice to reduce the backlog.

The premise of these proposals is that the Court's workload problem is temporary; that the solution requires no more than a one-time effort to reduce the accumulated backlog of filings and that, thereafter, the Court should be able to remain current with minor additional assistance. But this premise will not withstand analysis.

The Court's backlog has continued to grow even though the Court has increased its output. As indicated above, while the Court has increased the number of cases it decides by opinion, filings have also increased. As a result, since 1980, the Court has only disposed of as many cases in a given year as were filed in that year on two occasions. The Court has not been able to stay current even though available data reveal that it has been

were actually resolved in that process.

^{20/} See American Bar Association Lawyers Conference Task Force on Reduction of Litigation Cost and Delay, Defeating Delay 44; Ariz. Rev. Stats. §§ 12-145, 12-146; Admin. Order of May 7, 1984, of Ariz. Ct. of Apps., Division 1.

disposing of more cases per judge than similarly situated courts elsewhere.^{21/}

Furthermore, it has been able to raise the number of cases disposed of to the current level only at significant cost. One such cost is apparent in the statistics: a growing proportion of cases is now decided by unpublished opinions. This indicates that at least some cases which do indeed merit the additional judicial consideration entailed where an opinion will be published are not now receiving such consideration. In addition, several of the judges stated that workload pressures prevent their according adequate consideration to cases. Thus it appears not only that the Court has failed to keep pace with filings, but that its efforts to do so have adversely affected the quality of justice the Court has been able to dispense.

But even if the premise of the proposed temporary expedients were correct, there are either doubts about their efficacy, or strong arguments against them in principle, or both.

Since the Horsky Report, the Court has been utilizing senior judges to the full extent those judges have been available. It is doubtful that substantial additional resources can be marshalled from this quarter. First, many of the judges who have

^{21/} See National Center for State Courts Report, Appendix 3, Table 4, setting forth statistics for state courts of last resort with only limited discretionary jurisdiction in states without intermediate courts. According to that table, in the District, there were nearly 170 dispositions per judge per year. Only one other Court was even close to this (160 dispositions per judge); only two were over 100 dispositions per judge per year.

taken senior status in recent years have embarked upon new careers off the bench or have elected to devote considerable time to non-judicial activity. Second, there are legislatively-imposed limitations upon the extent to which senior judges can be compensated for their judicial efforts.^{22/} Third, it is simply not realistic to expect a judge who has retired to work as hard at being a judge as if he or she had not retired. The Clerk's Office informs us that its experience has been that, for those senior judges who continue to sit on cases regularly, three senior judges resolve approximately as many cases as one judge in regular, active service. There is no reason to expect more in the future, nor would it be either fair or reasonable to demand more from senior jurists.

The Douglas Report noted that the use of temporary judges "is not now a favored solution to appellate congestion and appears to constitute primarily a footnote to appellate court history." Douglas Report at 73. This is because, as the Commentary to § 3.01 of the ABA Standards points out, the use of auxiliary judges "deprives litigants of the opportunity for full consideration of their contentions by members of the court" and because the functions auxiliary judges perform "can ordinarily be per-

^{22/} See D.C. Code § 11-1565 (1988 cum. supp.). The senior judges earn at the same daily rate as active judges but can only receive the difference between their retirement payment and an active judge's salary. Under the statute, one of the currently active senior judges can only be compensated for 33 workdays per year; a second for 60 days; a third for 108 days; and the fourth for 147 days.

formed as efficiently, and with greater authority, by an intermediate appellate court."

Temporary expedients, then, do not constitute a realistic solution to the Court's workload problem, both because that problem is not a temporary phenomenon, and because such expedients do not provide sufficient resources of an appropriate kind to alleviate the problem significantly.

D. An Intermediate Court of Appeals As Against Adding Judges To The Present Court.

Both the Douglas and Horsky Reports debated the relative effectiveness of adding judges to the present court, on the one hand, and creating a new intermediate appellate court, on the other. The Douglas Report rejected adding more judges; the Horsky Report recommended temporarily adding two to three judges to the Court of Appeals, in large part because the Horsky Committee believed that the idea of an intermediate court was not "politically feasible." See Horsky Report at 12-13; 19-21. See also id. at 7-12. Compare Douglas Report at 21-24; 68-70. As the Douglas Report points out (at 70), adding more judges only increases judge resources when a court sits in panels, and therefore its utility is closely tied to the advisability of the panel system. Id. at 69-70. Indeed, adding judges can only exacerbate the defects of the panel system. Therefore, these alternatives cannot be meaningfully assessed without adverting to the relative merits of a unitary appellate court which ordinarily sits in panels, as compared to those of a system in which a highest court of last resort sits en banc assisted by an intermediate court of

appeals.

There is wide agreement that an en banc court of last resort/intermediate court system is the preferable model. The Commentary to § 1.13 of the American Bar Association's Standards Relating to Court Organization (ABA Standards - Court Organization) states:

[S]uch expedients as dividing the highest appellate court into panels . . . dilute the appellate functions, particularly that of developing the law. Adding additional judges to a highest court may actually slow down its operation rather than speeding it up. Hence, when improvements of efficiency of operation in the highest court cannot be achieved without dilution of the appellate function, the appropriate solution is the creation of an intermediate appellate court.

Furthermore, § 3.01 of the ABA Standards-Appellate Courts provides: "In hearing and determining the merits of cases before it, the supreme court should sit en banc . . . The Court should not sit in panels or divisions. . . ." The principal reason for the en banc requirement is to bring to bear a variety of intellects and experience in a highest court's law-declaring functions. See Commentary to § 3.01. Since, in performing that function, a court "makes law" in a very real sense, the importance of having such decisions reflect a variety of viewpoints and experience is manifest. The Commentary to § 3.01 also points out that sitting in panels is a device that is typically adopted when a high court's workload becomes too large; an expedient which tends to "persist long after the point has been reached

when an intermediate court should have been established."

The states overwhelmingly agree. Only thirteen states do not have intermediate courts of appeals.^{23/} Since 1980, six states have established intermediate courts.^{24/} The D.C. Court of Appeals has approximately twice as many mandatory appeals filed each year as the next busiest high court that has no intermediate court. See NCSC Report, Appendix 3, Table 4.^{25/}

It was largely for these reasons that both the Douglas subcommittee, which was greatly assisted by the National Center for State Courts staff (see Douglas Report at 6-7), and the National Center itself in its 1986 Report, recommended an intermediate appellate court for the District of Columbia. The Horsky Report did not disagree in principle; its view was that an intermediate court was not politically feasible, particularly when other means of reducing appellate delay had not been attempted first. The Horsky Report did, however, rely in part on the fact that the federal courts of appeals sit in panels, rarely sit en banc, and are rarely reviewed by the Supreme Court. Id., 7-8.

As the predominant practice of the states reflects, the fed-

^{23/} These are Delaware, Maine, Mississippi, Montana, Nebraska, Nevada, New Hampshire, North Dakota, Rhode Island, South Dakota, Vermont, West Virginia, and Wyoming. In addition, Puerto Rico does not have an intermediate court.

^{24/} These are Hawaii, Idaho, Minnesota, South Carolina, Utah, and Virginia.

^{25/} In addition, as the Douglas Report points out (at 68-69), only two states have ever had courts of last resort with more than nine judges, one of which was Virginia in 1779-1788 when the court of last resort was principally a trial court.

eral circuit court of appeals model is inapposite for a court of last resort. The circuits are not the final expositors of federal law; the Supreme Court of the United States performs that function. Furthermore, while the Horsky Report (at 8) was accurate in pointing out that relatively few decisions in any circuit are reviewed by the Supreme Court, what it overlooked is that the Supreme Court is constantly providing definitive resolutions of legal questions for all the circuits. All, or virtually all, of the Supreme Court's decisions provide definitive law for all the circuit courts of appeals to apply.^{26/} In a court of last resort, where the judicial lawmaking function of a jurisdiction resides, it is particularly important that the law be declared by a collegial body, both because decisions will be the product of greater wisdom, and because of the restraint engendered when decisions are forged from a consensus of different viewpoints.

There is really no question that the state court of last resort model applies to the D.C. Court of Appeals. Except for the District's history, and the fact that many members of the District's bar practice primarily in the federal courts, there might never have been a suggestion that the federal model applies.

There are two basic objections to providing the District with the same sort of appellate system as is already afforded in

26/ The Supreme Court decides approximately 300 cases per year, and has been averaging 170-175 resolutions per year by written opinion, with the balance by per curiam or memorandum decision. See Note, The Supreme Court, 1987 Term, Leading Cases, 102 Harv. L. Rev. 354 (1988); Note, The Supreme Court, 1986 Term, Leading Cases, 101 Harv. L. Rev. 366 (1987); Note, The Supreme Court, 1985 Term, Leading Cases, 100 Harv. L. Rev. 308 (1986).

all other jurisdictions that have anything like the amount of litigation in the District. The first is that adding another level to the court system will not significantly reduce delay because the time saved in reaching resolution in the intermediate court will be offset by the time taken up by the additional step of repairing to the court of last resort. See Horsky Report at 9-12. The second is cost. See id. at 9, 12.

There are tested mechanisms for limiting the amount of delay caused by adding another level of review. One method, adopted in Massachusetts, is to have the court of last resort determine in the first instance which cases it will hear and which ones will be heard by the intermediate court.^{27/} This procedure sharply limits the number of cases needing to be heard in both courts.^{28/}

27/ See Massachusetts' G.L.Ch. 211A. §§ 10-12; Rule 27.1 Mass. Rules of App. Pro. Copies of these are reproduced in Appendix C.

28/ We are informed by the Court's Office of Chief Staff Counsel that, in fiscal 1988, only 15 (or 5.7%) of the cases heard by the Supreme Judicial Court have been heard first by the intermediate court. The relevant FY 1988 statistics are:

Cases filed, intermediate appellate court

Screened by staff	1,057	
Considered by judges	200	
Accepted by SJC	130	130
Direct appeal by right to SJC	67	67
Direct appeal by request requested	82	
Accepted by SJC	51	51
Further review of decisions by intermediate app. ct.	15	<u>15</u>
TOTAL		<u>263</u>

Furthermore, while it requires that an additional document be filed prior to briefing, neither the preparation of that document, nor the screening process, need take a significant amount of time. Indeed, since an important part of the workload of a new court of last resort would be screening cases and deciding which ones should be heard, it is likely that a ruling on whether to hear a case could be issued relatively quickly. The Committee recommends that any effort to establish a new court of last resort and a new intermediate court of appeals provide for a screening procedure along the lines of that used in Massachusetts and other states.

In Maryland, for example, without requiring an additional document prior to briefing, the highest court makes a monthly review of appellants' briefs in the intermediate court, and selects those cases that it deems suitable for immediate review. 1987-88 Annual Report of the Maryland Judiciary, p. 14. Also, a petition seeking review in the highest court may be filed by any party in the intermediate court, at any time in the appellate process. Maryland Rule 812.

Even in the absence of such a procedure, however, the appellate courts ought to be able to provide considerable expedition of the entire process through the exercise of appropriate self-discipline. The conceptual basis for the intermediate court system is division of functions. The intermediate court is an error-correcting body; the high court is law-declaring. See the Commentary to ABA Standards, §§ 3.00 and 3.10. While, as with

all such distinctions, line-drawing problems arise in sorting particular issues and cases into these categories, in practice the division of functions should be clear enough. The job of the intermediate court is primarily to decide cases and to write only enough to provide guidance to the trial court. The job of the court of last resort is to provide reasoned decisions for interpretation of law and for resolution of conflicts among panels below.

An intermediate court that need not be concerned that it is establishing the law of the jurisdiction should be able to decide cases much more expeditiously than a court of last resort. Similarly, if the court of last resort limits the number of cases it takes to those that truly merit plenary review, it should be able to dispose of such cases relatively promptly while still affording them the kind of time and careful ratiocination which cases at that level of judicial review clearly deserve.

To ensure that the high court limits the cases it reviews directly, we recommend the adoption of a "term" system such as that employed by the Supreme Court of the United States. Under such a system, requests to hear cases are considered shortly after the certiorari petitions and any oppositions are filed. Cases argued in any given term are almost invariably decided before the court takes its summer recess. This system has enormous benefits in that it forces the court to stay current with its docket, and it provides an incentive against taking more cases than the court can hear and decide in a timely fashion. Finally,

it provides litigants with some idea of when a decision will be rendered in their particular cases.

The Committee believes that such a term system should be adopted for the court of last resort in the District of Columbia. The Committee is aware of, and sensitive to, the concerns which have been expressed that an intermediate court of appeals would simply add another tier of judicial review, thus driving up the cost of litigation and needlessly extending the time it takes to obtain a final decision. Adoption of a term system for a court of last resort would respond directly to those concerns.

Ideally, the time for determining whether the court of last resort will hear a case should not be much longer than the time presently consumed in disposing of petitions for rehearing or suggestions for rehearing en banc. Moreover, in those cases where review is granted, a lawyer will be able to advise a client when a decision is likely to be rendered, thus providing a measure of certainty -- now lacking -- important to client and attorney alike. Finally, a requirement that the court of last resort must finish its business by the close of a specific term makes it unlikely that the court will take on more cases than it can handle. If any backlog should develop, that will be a sign that the court is not performing its screening function adequately.

Even without a Massachusetts type "cert. first" procedure or term restriction on the top court, a number of jurisdictions we have examined demonstrate how an intermediate court system can

work. Minnesota, for example, created an intermediate appellate Court in 1983. In its fourth year of operation, the intermediate court disposed of its appeals in a median time of five and one-half to six months (depending on whether oral argument was heard).^{29/} Furthermore, only 6 percent of the cases decided by the intermediate court were reviewed by the Supreme Court.^{30/}

Maryland has posted a similar record. In fiscal year 1988, its Intermediate Court (the Maryland Court of Special Appeals) was disposing of its cases in an average time of from 4.2 to 5.1 months (again depending upon whether oral argument was heard).^{31/} Petitions for review by the highest court were filed in roughly 44% of the cases. 18% of those petitions were granted,^{32/} which means that only approximately 8% of all intermediate court cases were also reviewed by the highest court.

If, in addition, "cert. first" and term procedures are also adopted, we are confident that dual decisions in law-declaring cases can be avoided in the great majority of cases; law-declaring cases can be resolved in timely fashion; and the error-correcting cases should be decided promptly.

^{29/} Report of the Chief Justice at 37.

^{30/} Id.

^{31/} 1987-88 Annual Report of the Maryland Judiciary at 26, 32.

^{32/} Id. at 14, 16, 31.

Without question, creating an additional court is more expensive than adding judges to the existing body. The NCSC Report (at 30) recommended that the intermediate court be staffed initially with seven judges, and that the highest court be reduced by attrition from nine to seven or perhaps only five judges. However, it also foresaw that the intermediate court might have to be expanded to nine judges. Under the NCSC proposal, then, within the first year of operation, there would be 16 judges (9 on the top court, 7 on the intermediate) and later between 12 and 16 judges (5 on the top court plus 7 on the intermediate; or 5 and 9; or 7 and 9). That proposal is unquestionably more expensive than the Horsky Report's recommendation (at 19-20) that three judges be added to the existing court until attrition again reduces the number to nine.^{33/}

On the basis of its own premises, however, the Horsky Report's recommendation is now unequal to the task. That recommendation was premised on a projection that new filings would plateau near 1200 per year. Instead, they jumped to over 1500 per year in 1981 and have remained well over that level for the rest of the decade (reaching a high of 1828).^{34/}

^{33/} This is, of course, by no means the only way such a court of last resort could be seated. Unquestionably, the members of that Court should be drawn from the present D.C. Court of Appeals but there are other less sweeping ways to accomplish that.

^{34/} For that reason, and because the proposal "would not cure the fundamental problem of a highest court of a jurisdiction not sitting en banc", Mr. Horsky testified before Congress in 1988 that the Horsky Report's recommendations were not a solution to current problems. See Statement of Charles A. Horsky Before the Committee on the District of Columbia, U.S. House of Representatives, on H.R. 4366 at 3.

The most limited proposal put forward to address the problem is to add two permanent judges to the present court. That would leave the court with an odd number of judges, to prevent ties in en banc sittings. However, if the court of last resort were ultimately to be constituted of 5 judges (as envisioned, for example, by H.R. 4366, introduced in the last Congress), the additional costs of creating an intermediate court might be as little as those attributable to one more judge (if the intermediate court can be kept at seven).^{35/} Furthermore, while the inevitable occurrence of vacancies and recusals renders a five-judge high court less than ideal, it would nevertheless be a quantum improvement over the present situation: while occasionally decisions would be the product of only four, or perhaps even three, judges, now they are often the product of one or two.

Probably, however, the court of last resort should consist of seven judges. That is what the ABA Standards generally recommend. See the Commentary to § 1.13, ABA Standards-Court Organization (the "most common and generally satisfactory" size for a court of last resort). Hence, a court of appeals and intermediate court together would probably require something like five

^{35/} In this regard, it should be noted that senior judges, whether of the court of last resort or the intermediate court, would only sit on the intermediate court. The active judges on the court of last resort would always sit en banc. If the number of judges on the intermediate court cannot be kept at seven, it need not be increased to the next odd number, because the intermediate court never sits en banc.

more judges than the present system, and three more than the alternative of adding judges to the present court.^{36/}

It has been suggested that the District of Columbia is too small, geographically and in terms of population, to warrant a two-tier appellate system. The determining factor, of course, is not geography or population, but caseload. All states are larger than the District in territory, and some that manage without an intermediate appellate court have larger populations, but they have lesser caseloads.^{37/} Moreover, their populations do not swell like that of the District of Columbia during the working day. And, unlike the District, they are not commercial centers of an area with a population several times their own.

The ultimate question is whether the cost is worth incurring to provide those who depend on the District's courts (that is to say, all who depend on the criminal justice system in the District, as well as all those who work and do business here) with the kind of justice almost universally provided to others similarly situated. The committee has concluded that this question must be answered in the affirmative.

^{36/} As the NCSC Report recommends (at 31), the same clerk's office can be used for both.

^{37/} Mississippi, for instance, has almost four times the population of the District of Columbia and one appellate court of nine justices. But, in 1987, it had only 58% of the appellate caseload of the District, and appellate docket delay that year in Mississippi was even greater than in the District of Columbia. Mississippi Supreme Court, Annual Report, 1987, at 3-4. Nebraska, with a population more than twice that of the District of Columbia, had only 78% of the appellate caseload of the District; and the Nebraska Supreme Court during its 1987 fiscal year disposed of only 81% of the number of cases docketed. In each of the three previous years, it had also fallen behind. Nebraska Supreme Court, 1987 Annual Report at 1.

IV. Transcripts, Record, and Other Measures.

The Court of Appeals' Rules contemplate that the record on appeal should be transmitted from the Superior Court within 60 days from the filing of the notice of appeal. D.C. App. R. 11(a). The Rules contemplate, as well, that any transcripts needed to complete the record will also ordinarily be transmitted within 60 days of the notice of appeal. See D.C. App. R. 11(b). The Clerk of the Court of Appeals informs us that, with very few exceptions, records are now being transmitted within the 60-day period. However, records are not being completed for 7-8 months due to delays in receiving transcripts. In 1988, the average time from notice of appeal to completion of the record was 227 days; in 1987, 256 days; in 1986, 197 days. Indeed, there has been significant noncompliance with the 60-day standard for over a decade. The delay between notice of appeal and completion of the record was 124 days in 1978, and the delay has become progressively greater virtually every year since.

A. Transcripts

The Court Reporter Rules, as set out in the D.C. Rules Annotated, were promulgated effective March 12, 1973 by then-Executive Officer of the D.C. Courts, Arnold Malech and approved by then-Chief Judges Reilly and Greene. Those Rules required that all transcripts 300 or more pages in length be prepared for use on appeal within no more than 60 days. The new Manual, promulgated effective November 1, 1988 by Larry P. Polansky and Chief Judges Pryor and Ugast, has a phased schedule of time periods (see page 28) which does not require appellate transcripts (pre-

sumably of any length) to be available within 60 days until January 1, 1991 and thereafter.

Presently, transcripts need not be prepared in any less than 180 days; after July 1, 150 days; after January 1 of next year, 120 days; and after July 1 of next year, 90 days. This, notwithstanding the disclaimer on "Construction" in the current manual, which states that "this handbook is not intended to conflict with any relevant statutes or rules of court. In the event of such conflict, statutes and/or rules of court shall control."

None of the delay regarding transcripts is necessary. As the National Conference for State Courts observed in 1986, in the Montgomery County Circuit Court, transcripts are routinely available within 10 days. NCSC Report at 15. In pilot projects in Chicago, Phoenix, and Detroit, transcripts are available the same day. D. Moss, "Courtroom of the Future is Here", ABA Journal, February, 1989 at 26.

The Montgomery County system involves audio recording of proceedings and the use of contract reporting services rather than official court reporters. NCSC Report at 15. The audio recording system was modelled on the system installed (although almost never used) in Superior Court. The ABA Journal has pointed out that new, relatively low-cost technology is available that could entirely replace court reporters. K. Klores, "Court Reporters on the Way Out?", ABA Journal, February, 1989 at 28.

The District of Columbia court system should no longer tolerate delays in preparing transcripts beyond 60 days. To ensure that such delays no longer occur, the highest court in the jurisdiction should be clearly placed in control of the administration of the court system. In the vast majority of other jurisdic-

tions, either the chief judge (or justice) of the jurisdiction's highest court, or the highest court, controls the administration of the court system.^{38/} This should be accomplished in the Dis-

38/ According to a National Center for State Courts study, in 21 state or territorial jurisdictions, the Chief Justice of the highest court exercises administrative authority over the state court system; in 17 other states, the Chief Justice exercises this authority on behalf of the Supreme Court, with the court retaining ultimate authority; in 9 other states, the Supreme Court exercises the authority itself. Three states, including D.C., place system administrative authority in a judicial council or its equivalent. Four jurisdictions make no provision for exercise of system-wide authority, and New York has a mixed system of authority shared by its highest court, the Chief Judge and a board of intermediate appeals judges.

National Court Statistics Project, National Center for State Courts, State Court Organization, 1980 (1982). The following table sets forth which jurisdictions have which system.

<u>Chief Justice</u>	<u>Supreme Court Exercised by Chief Justice</u>	<u>Supreme Court</u>
Alaska	Alabama	Idaho
Colorado	Arizona	Massachusetts
Connecticut	Arkansas	Montana
Delaware	Florida	North Carolina
Hawaii	Illinois	Oklahoma
Indiana	Iowa	Pennsylvania
Kentucky	Kansas	Tennessee
Maine	Louisiana	Texas (Criminal)
Maryland	Nebraska	Vermont
Michigan	New Hampshire	
Minnesota	New Mexico	
Missouri	Ohio	
Nevada	Oregon	
New Jersey	Rhode Island	
North Dakota	Washington	
South Carolina	West Virginia	
South Dakota	Wyoming	
Wisconsin		
American Samoa		
Puerto Rico		
Virginia		
<u>Judicial Council</u>	<u>Other</u>	<u>None</u>
California	New York	Georgia
Utah		Mississippi
D.C.		Guam
		Virgin Islands

trict of Columbia by repealing D.C. Code § 11-1701(a) and by enacting a provision pursuant to which the chief judge or chief justice of the highest court in the District, is responsible for the administration of the court system. That is the system employed in the majority of other jurisdictions. See note 38.

Even prior to this legislative change, the Joint Committee should direct that, if delays in producing transcripts still regularly exceed 60 days by January 1, 1990, alternative systems will be employed as needed to insure the elimination of such delays, including, where the equipment is available, the utilization of audio recording facilities and engagement of contract reporters.

The Joint Committee should also immediately direct that computer-aided transcription must be employed by all court reporters within 60 days of the issuance of the direction.

B. Records

The National Center for State Courts also recommended that the Court consider using original trial court files as the record on appeal (NCSC Report at 15-16). On the basis of current information that, with rare exceptions, trial records are being transmitted within 60 days from the notice of appeal, the Committee believes that such a change is not presently necessary.^{39/}

^{39/} Apparently, the staff of the Appeal Coordinator's Office has been augmented by additional permanent positions.

Moreover, given the volume of proceedings and appeals in the District's system, it is prudent to retain the original records in Superior Court and provide copies to the appellate court.

The Horsky Committee recommended that, in agency proceedings, the agency provide only those parts of the record actually designated by parties. Horsky Report at 29. Such a procedure might not be prudent in small agency proceedings, in which a significant number of parties are pro se.^{40/} However, there is clearly merit to the proposal for transcripts in very large agency proceedings, such as some of those involving the Public Service Commission or the District's Contract Appeals Board. The Committee recommends that, in cases in which the agency transcript exceeds 500 pages, the agency provide the Court with only those parts of the transcript designated by the parties.^{41/}

V. The Dissenting Views.

A. Setting the Record Straight.

The Committee struggled with trying to diagnose the causes and nature of the Court of Appeals' workload problems for almost 18 months. It invited the views of everyone it thought might have insights and heard everyone who chose to address these problems. At the Committee's determinative decisional meetings,

^{40/} There are reportedly many pro se litigants in appeals from denials of welfare benefits and in unemployment cases, for example.

^{41/} The Clerk of the Court informs us that, in practice, in some very large agency cases in the past, the Court has ordered the parties to submit only partial transcripts and to agree on those parts to be filed.

many Committee members stated that they had at one time inclined to the view that an intermediate court might not be necessary. Yet, with only three dissents, the Committee overwhelmingly decided that establishing such a court was the only way out of the Court's longstanding and increasing problems of backlog and delay.

Against this history, it is simply inaccurate to suggest that the Committee began with that conclusion and shaped its premises accordingly. See dissenting views at 10 ("we fear the problem is posited to justify the recommended solution");⁴² Nebeker dissent at 1 ("the majority report . . . is based on erroneous premises used to justify the result"). We reject out of hand the suggestion that this Committee was animated by ulterior motives ("Only lawyers would benefit financially from the extended litigation [that would result from the Committee's recommendation]", dissenting views at 12).

Nor is it either fair or accurate to suggest that the Committee denigrates the performance of the Court of Appeals. In our view, the Court of Appeals is doing an outstanding job under very difficult circumstances. It is that very fact which deepens our concern about the quality of justice that the Court is now able to dispense. But our concerns are also voiced in the views of the judges who sit on the Court. In this regard, we recognize that it was difficult for the judges to state frankly that the Court's circumstances have caused them to produce work which does

^{42/} We refer to the principal dissent as "dissenting views," and distinguish it from Judge Nebeker's dissent.

not reflect what in their view the litigants deserve. We commend both their candor and their courage in doing so.

B. The Major Arguments.

The principal dissent argues that, because of increased efficiency in recent years, the Court of Appeals can now keep current with increased filings. Not only that, they urge, the Court can now actually dispose of the enormous and increasing backlog it has accumulated over 15 years in a single summer! Dissenting views at 2-8. The argument is not credible on its face.

It is based on a false premise. Its main support is the statistic that, in 1988, the Court reduced the average time from submission of a case to decision to 76 days, "the shortest time since 1971, the first year that the newly reorganized Court was in operation." Id. at 3. See also 6, 7. However, as we have pointed out ante at 9-10, 11-12, the 76-day figure is highly misleading, since it was achieved by drastically reducing (to a 7-year low) the number of published decisions, which normally require months to produce, while increasing an already relatively high number of MOJ's, which take, at most, weeks. Analysis discloses not that the Court was operating at greatly enhanced efficiency; but, rather, that it was deciding a smaller proportion of its relatively more difficult cases (or was deciding a greater proportion of such cases in a manner designed for less difficult cases).

Judge Nebeker's principal argument seems to be that there should be many more decisions containing little if any discussion. Nebeker dissent at 1-2. There are two difficulties with this, one philosophical and one analytical.

On a philosophical level, it cannot be gainsaid that the best assurance that appointed judges will act responsibly is the requirement that they state publicly the reasons for their decisions. This also encourages public confidence in the fairness of the process. Indeed, this would appear to be one of the principal characteristics that sets the common law courts apart from "star chamber" prerogative proceedings. Surely, the Founders would view with alarm the suggestion that judges appointed for 15-year terms should decide many, if not most, of the matters brought to them without being required to give their reasons.

Furthermore, the statistical information available shows that writing shorter MOJ's would yield only marginal savings of judge time. Dispositions by MOJ already account for more than 60 percent of the cases decided by three-judge divisions. In 1987, the Court decided 511 cases by MOJs as against 296 by opinions. Moreover, it disposed of those cases in an average of 23.8 days apiece. Only 23 of them took more than 100 days to decide. See p. 11 & n.11, supra.

Nor are significant savings of judge time likely to flow from efforts to shorten the Court's published opinions. The length of published opinions has only varied within a very narrow range over the past decade (8.1 pages to 11.5 pages). There is

no real pattern from one year to the next. Thus, while opinions in the last two years have been on the average 1.1. pages longer than they were in 1980, the Court's published opinions in 1987 were slightly shorter on average than its published opinions in 1978 (11.4 vs. 11.5 pages, respectively).

Regardless of the actual length of opinions, the fact remains that the Court is finding it increasingly difficult to issue published opinions in a timely manner. Thus, an injunction to write shorter opinions will probably not make much of a dent in the Court's backlog, and at some point excessive reliance on such a policy may compromise the Court's responsibility to define and clarify the law for the benefit of the Superior Court, the bar, and the public generally. The problem, we submit, lies not in how much a judge may choose to write in a given case, but in the volume of work which the judges are presently asked to shoulder before they ever set pen to paper. It is that latter problem which must be addressed and the Committee has concluded that simply tinkering with the current system will not be enough.

C. Comparisons with the Circuit.

We have shown that analogizing the D.C. Court of Appeals to the D.C. Circuit is not appropriate in light of the different functions they perform in their respective systems. The D.C. Court of Appeals finally declares the law of this jurisdiction, while a federal circuit court functions as an intermediate court in the federal system. See ante at 23-24. We also submit that any comparison of the output of the D.C. Court of Appeals and the Circuit is inappropriate.

The nature of the D.C. Circuit's caseload is very different from that of the D.C. Court of Appeals, and the nature of the bar practicing before the Circuit is also different. Resources available to the D.C. Circuit are vastly more abundant and arguably of superior quality.^{43/} In addition, the Circuit does not have responsibility for regulating and policing the conduct of a huge bar and preventing the unauthorized practice of law, as does the D.C. Court of Appeals. These responsibilities have occupied an inordinate amount of this Court's judge-time in recent years.^{44/}

Moreover in order to calculate the number of decisions issued per judge in 1988, the dissenters posit that there were 10 D.C. Court of Appeals judges. Id. at 5, n.7. This does not take into account the not inconsequential fact that the Court was short one of its nine judges in regular active service for more than half that year.^{45/} Further it counts the senior judges, using the formula that three senior judges equal one judge. Id. That, in turn, does not take into account that one of those senior judges was not used at all to hear cases for virtually all

43/ Every Circuit judge has three law clerks. Judges on the D.C. Court of Appeals have two. In addition, the Circuit has 12 staff counsel, compared to the D.C. Court of Appeals' 5.

44/ See, e.g., 117 D. Wash. L. Rep. 945 (May 7, 1989) (Revision of admissions requirements, including technical matters such as whether equipercentile or standard deviation method should be used for scoring standardized tests); 116 Wash. L. Rep. 1892, (Sept. 13, 1988) (Revised standards of professional conduct).

45/ Judge Schwelb was not appointed to fill the vacancy left by Judge Nebeker (in the fall of 1987) until May, 1988 and did not begin sitting until June of that year. Chief Judge Pryor retired November 1, 1989 and his vacancy has not yet been filled.

of 1988, because the Court was using him in an attempt to establish a settlement process. Nor does it take into account that another of those senior judges did not sit at all for much of that year. The majority discussed that ratio as only applying to those senior judges who did, in fact, continue to sit regularly. Probably a fair calculation would have assumed 8.75 judges for that year.^{46/} which produces approximately 84 opinions per judge, rather than the 73.8 on which the dissenters so heavily rely. *Id.* at 5, 6.

In addition, it is not clear how accurate the 100 opinions per circuit judge figure used by the dissenters actually is. In the first place, Judge Mikva, cited as the source for that figure, refers to the "average federal judge," not specifically to the D.C. Circuit. As to the Circuit, all we know is that, while it had 11 judges in active service in 1988, those judges and the visiting and district court judges sitting by designation together issued approximately 350 published opinions.^{47/} This amounts to something less than 32 published opinions per regular active Circuit judge.^{48/}

Using the same method of calculation, the approximately 8.5 judges in regular active service on the D.C. Court of Appeals in

^{46/} The senior judges together sat on 21 regular calendar cases (i.e., those likely to produce opinions), while the judges in regular service averaged 84 sittings on such cases.

^{47/} Information obtained from the Circuit Clerk's Office.

^{48/} How much less depends on how many of these opinions were written by judges sitting by designation, a figure not readily available. What is known is that the Circuit had judges sitting by designation continually in 1988.

1988 accounted for 249 published opinions, or an average of over 29 published opinions per judge. Thus the difference in number of published opinions per judge is more like 3 opinions per year. And, in any event, as shown above, each Circuit judge has 4 lawyers to assist him or her, while each Court of Appeals judges has an average of 2.6 and the Court of Appeals does considerable rule-writing and other work in connection with regulating the bar that the Circuit does not do.

D. Premises.

One of the dissenters' premises is that there are not enough "significant" law declaring-cases to warrant a separate court. The majority argues in support of that premise that no more than 25 or 30 cases a year warrant en banc consideration. Dissenting views at 8-9. In support of that argument, they cite judicial statements to the effect that the court hears only about one-third of the cases that merit en banc treatment, and point out that, over the last six years, the Court has been averaging about 9 en banc hearings a year. Id. at 8. Thus, they conclude that the number of cases meriting en banc consideration must be less than 30 per year.^{49/} However, such estimates are wrenched from their context, which was an inquiry into how many cases that

^{49/} Even if that low estimate were to turn out to be accurate, it would not argue against organizing the appellate system to permit those cases deserving of en banc consideration to be so heard and decided, without impairing the ability of the appellate court to dispose of more routine cases in a timely fashion. If there is judicial time available on the highest court which is not required for en banc cases, justices can be assigned to sit on panels of this intermediate court by designation.

should be receiving en banc consideration are not in fact being heard en banc under the current system. Presently, en banc review is by necessity and by Rule, limited to extraordinary cases. What the judges were telling the Committee is that, even under this exceptionally demanding standard, there were many more cases warranting en banc consideration than were receiving it.

In effect, despite a nod in the direction of providing some help in the form of additional judges, the dissent would perpetuate institutional anomalies which cause the law to be declared in this jurisdiction on a regular basis by as few as two judges, one of whom often cannot spare the time to be heavily involved in how the decision is written.

Another of the dissenters' premises is that the Court's workload should not increase significantly in the near future. Dissenting views at 14-15. This argument is based on statistics purportedly showing that workload trends in the Superior Court make appeals less likely. The statistics are not persuasive. Chief Judge Ugast testified before Congress on May 11, 1989 that the Superior Court needs at least 8 additional judges, even without having to cope with additional cases resulting from increasing the numbers of police and prosecutors. See Judge Ugast's May 11, 1989 testimony before the Subcommittee on Fiscal Affairs and Health of the House Committee on the District of Columbia. Unless Judge Ugast's judgment is wildly inaccurate, more, rather than fewer, appeals seem almost certain.

Nearly a decade ago, the Horsky Committee predicted that an intermediate appellate court might prove unnecessary because it

was thought that the Court's workload was not likely to increase significantly in future years. That prediction was wrong. The worsening crime problem in the District is only one among many current indicators which clearly tell us that there is today even less reason for confidence that the dissenters' similar prediction will prove any more prescient.^{50/}

VI. CONCLUSION

It is the Committee's view that more judges are demonstrably needed to process the current appellate caseload and to hand down correct decisions that are supported by reasoned explanations. The experience of other jurisdictions manifests that an appellate bench of the size now required for the District of Columbia is best and most efficiently organized in two tiers rather than one. Therefore, the Committee recommends creation of an intermediate court of appeals for the District of Columbia.

^{50/} It bears noting that while the Court's backlog and delay problems are significantly worse than when the Horsky Report issued, the dissenters believe the Court can eliminate the accumulated backlog with even fewer additional judges (two) than the Horsky Committee thought necessary (three) nearly ten years ago.

DISSENT AND MINORITY REPORT

Although we agree with the majority's conclusion that more judicial resources and administrative reforms would benefit the District of Columbia Court of Appeals (D.C.C.A. or Court), we respectfully disagree with the majority's call for grafting a whole new tier onto the current court system. We view the problems experienced by the Court differently, and we believe that they can be solved by means far less drastic, less costly, and more effective -- the permanent addition of two judges, two Appeals Coordinators, and some streamlined administrative procedures.

I. Simple Administrative Reforms Can Eliminate Most of the Court's Problems

Initially, we note our agreement with the majority that the court needs to undertake administrative reforms to reduce the inordinate amount of time currently consumed for the strictly mechanical task of preparing the record on appeal.^{1/} This, together with the time spent awaiting the filing of the briefs, accounts for two-thirds of the delay in disposing of cases and is

^{1/} Except where noted otherwise, the statistics that follow are derived from the tables in Appendix B, which were compiled by Al Stevas, a Committee member, from statistics published in Annual Reports of the District of Columbia Courts or obtained from the Court Clerk's Office.

(5) To formulate recommendations to achieve an orderly reduction of the Court's present backlog in the shortest feasible time and to prevent its recurrence.

The Committee has made a concentrated effort to explore all reasonable proposals for dealing with the problems of workload, decisional delay and backlog, including, but by no means limited to, the advisability of creating an intermediate appellate court.

In our judgment, an intermediate appellate court should be established for the District of Columbia. The present workload of the Court of Appeals appears to be such that no reasonable alternative means are available which would allow the Court to dispose of cases brought to it in a timely fashion without unacceptable sacrifices in the quality of the Court's work, increased risk of decisional inconsistency, and continued inability to hear more than an insignificant number of cases en banc. It is, moreover, the Committee's view that a mere increase in the number of full-time judges devoted to appeals would not allow the Court both to deal with its workload problems, on the one hand, and to assure the quality of the process, on the other.

The experience of other jurisdictions with the problem of structuring their appellate judiciary to accommodate growing caseloads demonstrates that the best and most efficient way of organizing that judiciary is in two tiers, with most cases being decided by three-judge panels in an "intermediate" appellate court and cases that are of greatest significance to the law of

issuing written opinions in record time, are disposing yearly of as many or more cases than are filed, are writing more in their published opinions and taking less time to do so, are disposing of frivolous appeals at the outset, are issuing a reasonable and adequate percentage of published and unpublished opinions, and are carrying caseloads which, although heavy, are not unbearable.

Specifically, in 1988, the judges required an average of only 76 days to enter decisions in published opinions and unpublished Memorandum Opinions and Judgments (MOJs). That is, from the time of submission or oral argument to the time of decision, only 76 days elapsed. This represents the shortest time required since 1971, the first year that the newly reorganized Court was in operation. It also represents a significant decrease from the average over the past several years (in 1987 the average time was 107 days), and is well under the time recommended by the ABA's Appellate Judges Conference Standards Relating to Appellate Delay Reduction -- 120 days.

The number of case dispositions has equalled or exceeded filings during the past two years. In 1987, the D.C.C.A. disposed of more cases than were filed, in 1988 the dispositions and filings were approximately equal, and as of April 30, 1989, the Court has thus far disposed of more cases than have been filed. Thus, the high number of filings has not stymied the Court, as the majority would have readers believe.

Also during the past two years, the judges wrote more in their published opinions and took less time to do so than they

did in 1980. On average the judges wrote 1.1 more pages per opinion, and spent 30 fewer days on each opinion.^{3/} This occurred despite the fact that there were 300 more cases filed in 1988 than in 1980, and is a testament to the abilities of the judges to meet the demands of their caseloads. Moreover, we note here that the quality of the judges' opinions indisputably remains very high. Representatives of the United States Attorney's Office, the Public Defender Service, the private bar, and Chief Judge Judith Rogers herself have praised the appropriate, studied, and fair nature of the D.C.C.A. opinions.

In 1988, the Court disposed of many more cases by entering orders, rather than opinions or judgments without opinions, than it had in the past. Over fifty percent of the cases filed were disposed of in this manner, requiring virtually no judicial attention. As the Court explained in the 1988 Annual Report of the District of Columbia Courts, the new requirement for the filing of a detailed docketing statement forced the parties to

^{3/} We acknowledge, however, that quantity does not always reflect quality, and we echo the belief of some reasoned jurists and litigators that many judges tend to write too much, and for too many people. Their voluminous writings tend to disrupt the educational progress of practitioners as well as law students, and may be curtailed without sacrifice. See, for example, The Lester W. Roth Lecture, "For Whom Judges Write," by The Honorable Abner J. Mikva, Judge of the U.S. Court of Appeals for the District of Columbia Circuit, 61 So. Calif. L. Rev. 1357 (1988). See also the Report of the Young Lawyers Section, *infra*, note 5 at 4-5 (recommending that "consideration be given in appropriate cases to adopting the federal practice of abbreviated dispositions containing a notation of precedents and perhaps a brief memorandum without a statement of the facts already well-known to the parties").

define the issues at the outset and "enhanced the Court's ability to dispose of frivolous appeals and various procedural matters at an earlier stage" (page 18).

Also, despite the majority's suggestion to the contrary, the percentages of published and unpublished opinions issued by the current Court are appropriate, and have have not been questioned seriously.^{4/} Representatives of the United States Attorney's Office and the Public Defender Service opined to the Committee that the percentages of published and unpublished opinions that were of concern to them (approximately 50% of the caseload) were "just about right." Very few counsel of the private or public bars request that unpublished opinions be published, and an in-depth 1986 Young Lawyers Section study found that the Court in almost all cases was implementing accurately its own guidelines in issuing unpublished opinions. ^{5/} The Committee was presented with no substantive or anecdotal evidence that more opinions should be published, and indeed the majority cites none. Accordingly, the majority tilts at windmills when it

^{4/} By definition, unpublished opinions, or Memorandum Opinions and Judgments (MOJs), are neither law-declaring nor error-correcting. See the D.C.C.A.'s Internal Operating Procedures VIII.D.

^{5/} "Report and Recommendations of the Committee to Study Unpublished Opinions of the District of Columbia Court of Appeals" by the Young Lawyers Section of the Bar Association of D.C., Mary Ellen Abrecht, Committee Chair, April 1986, at 5. In fact, this Report recommended a few changes in the guidelines to allow for the issuance of more unpublished opinions in certain defined circumstances. Id. at 8-14. A copy of the Report may be obtained by contacting the Bar Association of D.C.

attempts to suggest that the Court erroneously issues too many MOJs.

Further, the judges on the D.C.C.A. are producing on average 73.8 published and unpublished opinions per judge per year.^{6/} This may represent a relatively heavy caseload, but it does compare favorably with the caseload carried by federal circuit court judges, which, according to one knowledgeable source, averages 100 signed and unsigned opinions per judge per year.^{7/} Moreover, some judges are current with their present caseloads, proving that the workload is not unmanageable.

We believe it noteworthy that the Court has accomplished all of this at a time when it seldom was at full complement, due primarily to delay in the judicial appointment process. Our confidence in the current Court accordingly is justified, and the majority's insistence on the Court's inability to deal with its own affairs falls of its own weight.

In declaring that nothing short of creating a new court could effectively assist the current Court with its problems, the majority report fails to give sufficient weight to the statistical trends of the past few years, preferring to base its

6/ In 1988, the judges wrote a total of 738 published and unpublished opinions. Assuming that the D.C.C.A. at any given time consisted of ten judges (to encompass vacancies, recusals, the Clerk's Office estimate that generally three senior judges perform the work of one active judge, and each senior judge's current commitment to perform one-half the work of an active judge), each judge produced 73.8 opinions during the year.

7/ See note 3, supra.

analysis on figures representing the past eight, nine, ten or eleven years. The majority thus fails to give sufficient credence to the abilities of the current Court to dispose of as many cases as are filed (or more), to render opinions in an average of only 76 days, to dispose of frivolous cases much more quickly and briefly, and to begin to effectuate other administrative reforms.

Additionally, the majority relies on tracking the number of "filings" or "pending cases" to demonstrate the "overwhelming" number of cases awaiting judicial attention. Yet the experience of the past decade clearly shows that approximately 50% of the filings "melt" out of the system requiring little or no attention from the judges. By "melt" we mean that the cases are disposed of by one-judge orders which reflect either that the parties reached a compromise or that one party decided for whatever reason not to proceed with the appeal. An additional 30% of the case are decided by non-precedent setting, unpublished MOJs, and only 20% of the cases are error-correcting or law-declaring and are decided by published opinion. Assuming, as stated above, that in 1988 each judge put pen to paper in an average of 73.8 cases, then each judge issued published opinions in an average of 29.5 cases last year. This may be considered a substantial undertaking, but it certainly does not reflect an "overwhelming" backlog of cases on judges' desks, especially in view of the fact that judges are taking on average only 76 days to consider, write, circulate and publish each opinion.

Moreover, we note that even the number of filings, relied upon so heavily by the majority, peaked in 1984 and has decreased somewhat since then.

In sum, during recent years, experience and statistics confirm that the Court is issuing more quality opinions more quickly, is conforming to its own guidelines concerning the percentages of published and unpublished opinions, is according to each judge a manageable, if heavy caseload, and is making some progress in expediting the decisional process. Accordingly, the premises cited in the majority report -- that "the court cannot keep up with its docket," "the court is being asked to hear more cases," "these cases are taking longer to decide," "the court is also finding it harder to dispose of cases in a timely manner" (pages 5 and 6) -- are unfounded, and the reasoning that follows is flawed.

The only significant cog in the turning wheels of appellate justice is, as described above, the purely mechanical problem of obtaining the transcripts and briefs in a timely fashion. Once that problem is solved, any perceived "need" for major reform -- such as the addition of a whole new layer of appellate bureaucracy -- dissipates. To be sure, should the Committee's unanimous recommendation concerning the rapid production of transcripts be implemented, it appears that the Court temporarily would be inundated with a significant number of cases awaiting disposition. We believe that this "balloon effect" would be temporary, given the proven ability of the court to dispose of at least as many

cases as are filed each year, and could be taken care of a number of ways. One method would be to encourage all the active and senior judges, as well as the staff attorneys and other employees, to devote extra time and effort throughout the months of July and August (traditionally slow months for the Court) to handle the added caseload. Similar efforts have worked to reduce large backlogs in other jurisdictions and should not require more than one summer's worth of extra effort. Further, with the help of two more judges and Appeals Commissioners, as we recommend below, the demands on each individual judge assuredly would not be too great.

The majority errs further in positing that, under the current system, enough additional cases warrant en banc consideration to require the establishment of an intermediate court, and that decisional consistency is a problem.

It is true that some of the active judges have expressed concern about the limited number of en banc cases heard each year. However, Al Stevas, a Committee member who served as Chief Deputy of the U.S. Court of Appeals for the District of Columbia Circuit for seven years, as Clerk of the D.C.C.A. for ten years, and as Clerk of the United States Supreme Court for five years, reviewed the published opinions issued by the Court for 1987 and found few additional cases that arguably may have deserved en banc consideration. No one who has given serious attention to this issue, including majority members of our committee, has

suggested that more than 25 to 30 cases per year may warrant en banc consideration.

In fact, the majority, having cited the number of en banc cases heard each year since 1982 -- a number which averages 8.7 cases per year -- proceeds to explain that, in the opinion of one or more D.C.C.A. judges, "those represent only about one-third of the cases deemed to merit en banc review" (page 14). Thus, even the majority cannot count more than 25 to 30 cases yearly that arguably may merit en banc review. Surely the creation of a new and additional appellate court is not justified for this reason, and with the added assistance of two judges, two Appeals Coordinators, and some administrative reform, the current Court should be able to sit en banc more often, if indeed it ultimately decides to do so following its own procedural rules.^{8/}

The additional resources we propose also should allow the judges more time to contemplate their decisions, as well as those of their colleagues.^{9/} The resources similarly should solve any perceived problem of decisional inconsistency, although we stress

^{8/} The majority errs when it characterizes the current standard for en banc review as "limited to extraordinary cases" (page 48). The Court's Internal Operating Procedures XI.J. allows for rehearing en banc to reconsider precedent or in cases of exceptional importance. We believe this standard to be appropriate and reflective of that in other jurisdictions. The majority makes no specific argument that this standard is inappropriate, and thus fails to support its argument.

^{9/} Here we concur with the majority that the collegial process might be enhanced by instituting the purely procedural reform of assigning cases to judges for writing after oral argument, rather than before (page 13, note 13).

that the Committee received no substantive or anecdotal evidence to support the existence of such a problem in this jurisdiction. Indeed the majority can raise only the "possibility" of such a problem in its argument (page 12), and we fear that the problem is posited in order to justify the recommended solution.

Thus, the majority's contention that the current Court could under no circumstances control its calendar or caseload, continue to issue quality opinions, unburden the judges to a reasonable extent, consider enough cases en banc, or avoid decisional inconsistency is meritless, and is based upon outdated statistics, erroneous assumptions and flawed reasoning.

III. Dangers Would Ensur From The Addition Of Another Appellate Court in D.C.

Contrary to the contention of the majority, the best interests of the litigants, the judges and the legal system would not be served by the addition of another layer of appellate review. First, it would extend unduly the time cases would take to reach final disposition because all parties losing in the intermediate appellate court would be encouraged to file petitions for certiorari in the high court, and prevailing parties would feel forced to file oppositions. The high court then would spend time and effort reviewing numerous petitions and oppositions, and in cases where certiorari were granted, more time and effort would be expended on new briefs, oral arguments, opinion writing, dissents, concurrences, etc.^{10/}

Second, the costs of the extended litigation would be significant and unnecessarily borne by the parties, including

those who prevailed in the trial and intermediate appellate courts, and by the taxpayers. One could anticipate that the taxpayers' funding of appeals under the Criminal Justice Act would increase, ^{11/} and the taxpayers would bear the heavy burden of funding a whole new layer of bureaucracy -- a layer of judges, staff, equipment, supplies, space and a new courtroom -- which it is estimated would cost more than \$3,000,000 a year.^{12/} As the majority itself acknowledges, these costs would be significant, exceeding by far the relatively modest expenses involved in implementing our proposals. Only lawyers would benefit financially from the extended litigation imposed by the creation of another appellate court.

10/ The majority misleads the reader when it states that "with only three dissents, the Committee overwhelmingly decided that establishing [an intermediate appellate] court was the only way out of the . . . problems of backlog and delay" (page 41). Several, perhaps most of the members of the majority, remained unconvinced that the problems of backlog and delay would be solved by establishing an intermediate appellate court. Their reasons for favoring such a court varied, to include, for example, allowing more time for judicial contemplation, having more cases heard en banc, and following the states that have two-tiered systems.

11/ Total disbursements under the Criminal Justice Act rose from \$4,980,000 in 1982 to \$15,766,600 in 1987. The projected total for 1989 is \$16,542,000. As there would exist no disincentive for lawyers paid under the Act to file petitions for certiorari with the high court, it is reasonable to assume that the already heavy disbursements would increase significantly.

12/ The D.C.C.A. estimated, in a separate budget filed for Fiscal Year 1990, that \$1,217,480 would be needed annually to pay the salaries of 37 additional court personnel to the high court. When the added costs of judicial salaries, chambers, a new courtroom, equipment purchase and maintenance, supplies and other start-up and operating expenses are factored in, the price rises dramatically to well over \$3,000,000 per year.

Third, the addition of another tier would not affect the salient characteristics of the Court's workload -- the "melt factor" would remain at 50%, 30% of the cases filed would be disposed of by MOJs, and 20% of the cases filed would be the subject of error-correcting or law-declaring opinions. Accordingly, justices on the high court would not be involved in 90 to 98% of the cases filed, and might be forced to find innovative ways to keep busy.

The total number of published opinions, which by definition encompass error-correcting and law-declaring opinions under the Court's Internal Operating Procedure VIII.D., has averaged 281 per year over the past nine years. The majority contemplates giving to the intermediate appellate court all of the error-correcting cases, and to the high appellate court all of the law-declaring cases. Putting aside the question of whether all law-declaring cases merit en banc consideration, and the majority's admission that only 25 to 30 cases per year might merit en banc consideration, it is evident that two separate courts are not needed to dispose of only 281 cases per year. Sound fiscal and public policy would not permit such a result. Assuming, moreover, that the intermediate court also would and should issue MOJs, which under the Internal Operating Procedure cited above are neither error-correcting nor law-declaring, the caseload would remain too small to justify adding another layer of process to our appellate court system.

Here we note that the majority, while pressing for a higher quality of justice which in their opinion is "almost universally provided to others similarly situated" (page 35), would allow the high court to regulate its own intake according to the number of cases that it felt it could handle within a "term". But what of those cases which are law-declaring or represent a conflict among the panels that would not be taken in order that the court remain current and handle everything "in term"? The litigants in those cases surely would not be afforded first-class justice. In our view, the current system affords to each and every litigant the fairest possible justice.

Fourth, as the new high court would sit only en banc, the justices would be free to disregard stare decisis, as enunciated in the 1971 M.A.P. v. Ryan decision.^{13/} Thus, the ability of the high court to maintain uniformity of decisions and to enunciate law and policy would be undercut by its ability more easily to deviate from precedent. Our carefully developed body of law would be at risk.

We note here that in an attempt to reduce the inevitable additional delay and to streamline the more complicated procedures occasioned by the creation of two appellate courts, the majority proposes that a unified clerk's office be established. The economies of effort and money sought to be offered by a unified clerk's office may be elusive, however, for the state of

^{13/} 285 A.2d 310 (1971) (D.C. Circuit decisions are considered binding precedent on the local courts, unless and until they specifically are overruled).

Virginia, which adopted a two-tiered appellate system in 1985, has found it desirable, beginning on July 1, 1989, to split its formerly unified clerk's office into two offices, one for each appellate court, and to hire additional staff and incur additional overhead.^{14/} Insofar as the majority bases its recommendation about a unified clerk's office upon the Virginia model, it must be considered based on shaky ground.

We note further that the two appellate courts which currently exist to serve this relatively small city, the D.C.C.A. and the U.S. Court of Appeals for the District of Columbia Circuit,^{15/} serve it well, and there is no justification for adding yet another court to the current system just because many "states overwhelmingly" have two-tiered systems.

Indeed it may be argued that the federal appellate model is more appropriate for emulation here. The systems share the Presidential appointment of judges, confirmation by the Senate, federal salary levels, some continuing service by senior judges, caseload characteristics, and high reputations. Both systems function well with provisions for panel and en banc reviews within one tier of appellate justice, and, contrary to the

^{14/} This information was gained from an announcement in the National Conference of Appellate Court Clerks Newsletter, Vol. 16, No. 3, April 1989, and from a conversation with David Beach, Esq., Clerk of the Supreme Court of Virginia.

^{15/} The U.S. Court of Appeals for the District of Columbia Circuit decides many cases involving important local issues, e.g., prison litigation, demonstrations on federal property, discrimination against employees by the federal government, environmental impact statement cases, etc.

distinction made by the majority, both courts function in effect as courts of last resort for almost all of their cases.

Finally, we caution that a new appellate tier, once created, would be difficult if not impossible to eliminate. Accordingly, less expensive and delay-reducing alternatives should be implemented first.

IV. Proposed Adjustments To The Current System

To reduce further the backlog and delay presently experienced by the D.C.C.A., to allow the judges more time to decide cases in panels or en banc, and to permit the judges more time to review the work of their colleagues, we propose the immediate addition of two permanent active judges to the Court. This could be accomplished within the existing facilities at a fraction of the cost and expense of an added court. (We note that the Horsky Committee proposed such an addition to the Court, but unfortunately, its proposal never was implemented.)

There is every reason to expect that an eleven-judge Court could accomplish the work of the Court for the foreseeable future. The workload of the D.C.C.A. should not rise significantly in the next few years for several reasons. First, appeals from the Superior Court Criminal Division should not increase significantly. Superior Court workload statistics for criminal cases (which account for approximately 50% of the appellate caseload) reveal that the number of U.S. felony and misdemeanor cases pending at years' end has been reduced from a high of 5,816

in 1984 to 5,175 cases in 1988. ^{16/} The number of U.S. felony and misdemeanor cases tried before a jury or a court has decreased significantly since 1985. Dispositions by pleas of guilty have increased, but very few appeals are taken from these dispositions. And we note that even in the event that an increasing number of drug cases find their way to the D.C.C.A., these cases usually do not present complex legal issues nor do they generally result in lengthy opinions. In fact, the vast majority present appeals from denials of motions to suppress for lack of probable cause to search or arrest -- uncomplicated issues which routinely are dealt with on the summary calendar by brief MOJs. Moreover, current efforts by the United States Attorney's Office to prosecute proportionately more drug cases in the U.S. District Court for the District of Columbia will lighten the load on the District of Columbia trial and appellate courts.

Second, Superior Court statistics pertaining to civil, landlord and tenant, juvenile, and family cases (which generate approximately one-third of the appeals in the D.C.C.A.) reveal that no dramatic changes or increases in appellate case filings are expected.^{17/}

^{16/} See note 1, supra.

^{17/} Id. Civil cases pending on the jury calendar have been reduced from a high of 4,465 cases in 1983 to a low of 3,276 at the end of 1987. The total number of cases on the non-jury calendar have been reduced from a high of 2,563 in 1983 to a low of 1,839 in 1987. The new case filings in Superior Court for civil, landlord and tenant, juvenile, and domestic relation cases, do not reflect any indications of unusual increased appellate activity.

Finally, the increased filings from District of Columbia agencies anticipated by the majority are illusory. The number of new filings from those agencies reflect a decrease from a high of 348 cases in 1984 to only 191 cases in 1988. However, if for some reason the number of such filings eventually becomes burdensome, an administrative board could be created which would act as an intermediate, specialized court of appeals to consider those cases.

To assist further the Court in streamlining its procedures and remove some of the administrative burden from the judges, we propose the continued and expanded use of mandatory pre-briefing conferences,^{18/} and the appointment of experienced litigators or senior judges as Appeals Commissioners to assist in the screening of cases, the sharpening of issues and the review of cases to avoid "decisional inconsistency." More specifically, the Appeals Commissioners could conduct the pre-briefing conferences, could assist the Motions Division in settling cases and/or clarifying issues, could review continually division opinions to alert the Court to possible inconsistencies, and could assist the Court in processing and disposing of Board of Professional Responsibility cases. As a result, some of the administrative burden could be

^{18/} In this area the Court's experience to date has been limited, and no follow-up statistics have been compiled. Based on relevant experience here and in other jurisdictions, we believe that such conferences can be of value for purposes of issue-focusing as well as settlement.

lifted off of the judges, freeing them to contemplate further their own and their colleagues' positions.

VI. Conclusion

We believe that the majority report is based upon incomplete analysis and flawed reasoning. Experience and the most reasonable and relevant view of the statistics confirm that the Court's national reputation for administering high quality justice is well deserved, and can be maintained by making relatively minor adjustments to the current system.

Accordingly, we urge that other, less drastic solutions to the Court's problems be attempted before an entire new court, which would contribute to the problems rather than the solution, is created at tremendous added cost to the citizens of the District. We strongly recommend that the more effective solutions of adding two judges and Appeals Commissioners to the current Court, and streamlining some administrative procedures involving case screening and processing be implemented. These changes would enable the Court to process its caseload most efficiently and effectively, and to insure that the quality of its decision-making remains of first-class caliber.

Statement of Judge Frank Q. Nebeker in Dissent

As I read the majority report, it is based on erroneous premises adopted to justify the result. There is no question that an intermediate court of appeals can be created and the present work spread around -- the least interesting to the new court and the gravy to the top court with built-in leisure to work at a self-determined pace. I respectfully suggest that the cost of such a step is too great; the need for it is not justified; and a few changes in the present system are still available to be made in lieu of the one proposed. I add the following from my perspective as a former associate judge.

Much is made by the majority of the notion that the backlog creates one judge opinions which are presumed to be bad. To analyze this proposition is to refute it by facts and concept.

Judges of appellate courts are there to make judgments. They are not proofreaders and they are surely not scribes of the green eye shade, tall stool and sleeve garter type. The judgments they make individually and collectively stem from a review of the facts of a case, and gratefully in only a few cases do they make a judgment changing the law. In most cases, the legal decision is simply that the law was correctly or incorrectly applied to the facts. That few decisions wrought major law changes is what gives stability -- predictability -- to the law. The insistence of the majority that more en banc decisions are desirable is, I submit, open to serious question. It is an overstatement used to justify their conclusion. And it must be remembered

that an en banc court is bound only by sound judgment and not precedent. So I fail to see any evil in the present division-of-three practice. It does ensure the ability to know and predict our law. The idea of "writing around" an opinion of the court -- I call it distinguishing the case -- is not bad. It is a legitimate practice and necessary exercise and must be a major practice of any court perpetually sitting-en-banc, as well as one sitting in divisions.

Having observed that judgments are the work product of an appellate court, it is appropriate to question how to articulate them and to what extent. Over the past twenty-five to thirty years, as litigation has increased, most appellate courts have taken to very truncated statements of decision or judgment. Eighteen years ago Judge Kern and I proposed to this very court the device of a summary calendar for cases that appeared to be simple and properly decided by application of well-established law. I fear that but for Judge Newman, the unpublished opinions in those cases have become an indulgence in the verbose. Much time and effort is wasted on them. It ought to stop so the court can devote its efforts where needed. Again, it is a matter of judgment to write extensively on a case not warranting it. I believe that the court in most of its cases has fallen into a practice of running the gamut of a full opinion when a simple decision would do. All federal circuit courts and most state appellate courts use the short form of decision.

A misallocation of time happens when a summary calendar case is treated to a multi-page unpublished opinion. It is then that unwarranted time is spent by all three judges. There would be a great reservoir of time and energy available if those cases were accorded the time they deserve instead of the disproportionate time they receive. Given the number of summary calendar cases and the time devoted to them, I believe this change in approach itself would eliminate any argument for adding another court.

In this vein, I will digress to observe that most litigants and lawyers want a decision, not the equivalent of a Rembrandt opinion. While I am the first to agree that the work on an appellate court can be repetitive, appellate judges must avoid indulging themselves in intellectual ego trips in the name of refining the law. Too much time is consumed which could be better spent on other cases awaiting decision.

All of this takes me to my last point. After eighteen years on the court, I can say that no judge really permitted a one judge decision. The majority either misunderstands the judges or creates yet another "straw" argument as to this point. I refuse to believe that my former colleagues are not performing their lawful duties when it comes to participation in decisions. My experience tells me otherwise. Moreover, my premise that appellate judges make judgments and use staff to articulate them leads to the conclusion that a well-reasoned decision need only command a concurrence from the others on the division or court. Such opinions are often written, though they remain an efficiency

fondly to be hoped for. If these are one judge opinions we should have more of them.

On the other hand, I know of no member of the present court who shies from making suggestions as to reasoning and analysis either by a visit or through memorandum. Indeed, the court's opinions reflect, through separate concurring and dissenting opinions, a healthy individual effort by each judge.

I certainly do not begrudge my former colleagues the time they seek to be more contemplative in the cases warranting such effort, but I do not see a new and totally drab error correcting court as the answer. Cases can be speeded to submission, and, thereafter, sound judgments can be made to allocate less time and effort to those not warranting it, thus, leaving the time needed for the relative few complex ones. We must face the fact that many appeals are brought without regard to their substance. This is particularly so in criminal and some administrative cases. "Throwing" more judges at them, like money, is not the answer.

Thus, I submit, the majority's straw arguments of division inconsistency, one judge opinions, a need for more en banc action, and a need to treat all cases as if they were of near equal complexity when seen for what they are fail to justify the conclusion that yet another court should be added to the already expensive labyrinth of litigation.



WHAT TO EXPECT IN D.C. SMALL CLAIMS COURT

District of Columbia Courthouse
500 Indiana Avenue, N.W.
John Marshall Level
Washington, D.C. 20001

8:30 a.m. to 4:00 p.m.
(Monday - Friday)

9:00 a.m. to 12 Noon
(Saturday)

6:30 p.m. to 8:00 p.m.
(Wednesday Evenings)
879-1120

Superior Court of the District of Columbia

Fred B. Ugast
Chief Judge

WHAT IS SMALL CLAIMS COURT?

Small Claims Court is a place where you may go to try to recover claims of up to \$2,000. A claim, generally speaking, asserts a legal right you may have. The Small Claims Court is an informal court that attempts to be quick, simple and inexpensive to use.

You may use the Small Claims Court to sue anyone who LIVES, WORKS, or DOES BUSINESS in the District of Columbia.

You may sue in Small Claims Court when you have an automobile accident in the District of Columbia—no matter where the other driver lives.

You may only try to recover money in Small Claims Court. If someone has damaged your property, you must sue for the cost of fixing or replacing it. You cannot sue to try to get property other than money returned to you.

You may want to try to resolve your dispute with the help of a mediator before you file a claim in court. Mediation for small claims disputes can be arranged through the Court's Multi-Door Dispute Resolution Program by coming to Room 1235 or by calling 879-1549 between 9:00 a.m. and 4:00 p.m., Monday through Friday. Mediation may save you time, money, and stress.

WHEN MAY I SUE IN SMALL CLAIMS COURT?

You may sue when you believe someone owes you money. For example, you MAY SUE IF:

- Someone fails to return a deposit to you;
- Goods and/or merchandise that you purchased is defective and the seller refuses to repair, refund or replace it;
- You have a loss due to an accident;
- Your property is damaged or destroyed by someone performing a service for you.

DO I NEED A LAWYER IN SMALL CLAIMS COURT?

Small Claims Court is an informal court and procedures are kept simple to permit you to use the Court without a lawyer. Sometimes cases can be complicated and a lawyer may be able to advise and help you. Plaintiff corporations are required to have a lawyer.

If you CANNOT AFFORD A LAWYER and request legal help, the judge may assign a lawyer

or a law student to assist you. There are several independent agencies which may be able to help you.

D.C. Law Students in Court Program
419 Seventh Street, N.W., Suite 202
Washington, D.C. 20004
638-4798

Columbus Community Legal Services
1713 North Capitol Street, N.E.
Washington, D.C. 20002
526-5800

Legal Aid Society
666 Eleventh Street, N.W., Suite 300
Washington, D.C. 20001
628-1161

Neighborhood Legal Services
310 Sixth Street, N.W.
Washington, D.C. 20001
682-2700

If you do want legal assistance, it is best to REQUEST IT WELL IN ADVANCE OF THE HEARING DATE.

HOW DO I SUE IN SMALL CLAIMS COURT?

Go to the Superior Court Small Claims Court Clerk's Office at 500 Indiana Avenue, N.W., John Marshall Level, Room JM-260. PLEASE TAKE WITH YOU:

- The complete and proper legal name and address of the party you wish to sue. This party is called the "DEFENDANT." You will be the "PLAINTIFF."

If a business is being sued, call 727-7283 between 2 and 4 p.m., or visit the Department of Consumer and Regulatory Affairs, Corporate Records Section, at 614 H Street, N.W., to find out if the business is INCORPORATED or is using a "trade name" (NOT INCORPORATED).

If the business IS incorporated, ask the person in the Corporate Records Section office for the name and address of the REGISTERED AGENT for the corporation. That is the PARTY (PERSON) who will receive notice of the suit.

If the business IS NOT incorporated, you must find out the NAME OF THE OWNER of the business, NOT the name of the BUSINESS ITSELF. This information may be obtained by calling 727-7010 or 7077 or

going to the Business License Branch located at 614 H Street, N.W., 2nd Floor. Ask the clerk there for both the name and address of the owner of the business.

—If you are suing someone as a result of an automobile accident and you do not know the owner of the automobile, the tag number is helpful for determining the name and address of the owner. You may have to call the Bureau of Motor Vehicle Registration Office at 727-6681 or visit the D.C. Municipal Center, 301 C Street, N.W., Room 1157, to obtain the owner's name. If it IS NOT a District of Columbia car, you should contact that state's motor vehicle registration office for more detailed information.

—It is IMPORTANT that you bring a copy of any written evidence that may help you prove your claim in court such as:

- Contracts
- Repair Estimates (2 or more)
- Leases
- Letters/Written Records
- Receipts
- Promissory Notes
- Paid Bills
- Cancelled Checks

FILING YOUR CLAIM

1. The Clerk will give you a Statement of Claim Form. Be prepared to fill it out right then and there. Be prepared to provide the following information:

—Your name, address, and telephone number where you can be reached during the day.

—The correct name and address of the party you are suing. If it is a corporation, you will need its proper name and address and the registered agent's name and address.

—A simple but COMPLETE statement of why you are suing. This should include:

Dates and locations as they relate to your claim; and

The amount of money you are trying to recover.

Remember: The limit is \$2,000, not including interest, costs and attorney's fees.

ALWAYS ADD "PLUS COSTS AND INTEREST" TO THE AMOUNT YOU ARE SUING FOR. If you win the case, you MAY get this back.

2. Next, take your Statement of Claim to the cashier's window and pay a filing fee of \$1.00, plus \$2.29 for service of the claim by mail.

This is the cost of filing the suit. The Court will notify the party by CERTIFIED MAIL that he/she is being sued or you may use a SPECIAL PROCESS SERVER (someone YOU HIRE for a fee to serve your claim, NOT THE CLERK).

Both the plaintiff and the defendant are required to send each other copies of everything processed prior to the hearing date.

If you CANNOT AFFORD to pay the filing fee, tell the Clerk that you would like to HAVE THE PREPAYMENT OF FEES WAIVED, and he/she will assist you.

3. The cashier will set a date for the hearing.

You may usually choose a hearing date convenient for you by filing your claim two weeks before the day you want your hearing.

You will be asked to call the Clerk's Office one (1) to two (2) days prior to the hearing date to determine whether a copy of your Statement of Claim has been served on the defendant.

WHAT IF SOMEONE SUES ME?

1. If you are being sued in Small Claims Court, you will receive a Statement of Claim against you notifying you of the hearing date.
2. DO NOT IGNORE the Statement of Claim. If it is IMPOSSIBLE for you to appear on the date scheduled for trial, notify the Clerk of the Small Claims Court, either in person or by telephone, and he/she will advise and assist you in requesting a new trial date.
3. YOU MUST call the Clerk if you cannot appear. DO NOT just fail to show up. IF YOU DO NOT CALL AND DO NOT SHOW UP, A JUDGMENT WILL MOST LIKELY BE ENTERED AGAINST YOU. This means you will lose without a chance to tell your side of the story and without the chance to arrange for monthly payment of a judgment against you.

4. **DO NOT ASSUME** that your case is **HOPELESS**. Even if you think you owe the money, you may have a legal defense. A lawyer or law student may be able to help you.
5. If you think you have your own claim against the party suing you, notify the Clerk that you want a **COUNTERCLAIM FORM** and ask him/her how to prepare this.
6. Call or visit the Court Clerk if you have any questions. **THE CLERK'S JOB IS TO HELP YOU.**

HOW DO I PREPARE FOR COURT?

1. Ask for **WITNESSES**, who saw what happened or **HAVE KNOWLEDGE** which might help your case, to arrive at Court on the hearing date.
If a witness will not agree to appear, tell the Clerk you want to **SUBPOENA** him/her.
If the subpoenas are to be issued to witnesses, you should call the Clerk's Office three to four days prior to the hearing date to allow the subpoenas to be served upon the witnesses. Service may be made by certified mail or special process server. Subpoena forms are available from the Clerk. There is a fee of \$2.00 to the Clerk and a witness fee of \$40.00, plus transportation, for each witness subpoenaed.
2. Gather all the evidence that relates to your claim or your defense if you are being sued. This includes **CONTRACTS, RECEIPTS, PROMISSORY NOTES, LETTERS, CANCELLED CHECKS** or **OTHER WRITTEN MATERIAL**. **BRING THIS EVIDENCE TO COURT WITH YOU.**
3. **GO OVER THE FACTS AND ORGANIZE THEM IN YOUR MIND.** You may want to write down the most important facts, since you will need to give a clear statement of the facts in court.
4. Call the Clerk's Office one to two days prior to the hearing date to be sure your case is still scheduled. **BE SURE** the other party received notice of the hearing. If the defendant was not served with a copy of the Statement of Claim informing him/her of the hearing date, the case **WILL NOT** be heard on the scheduled date.

WHAT HAPPENS AT THE HEARINGS?

1. Arrive early and bring all court papers with you.
If you are suing and you arrive after 9 a.m., or do not appear at all, your case may be **DISMISSED**.

If you are being sued and arrive after 9 a.m., a judgment may be entered against you. In other words, **YOU MAY LOSE WITHOUT A HEARING IF YOU ARE LATE.**

2. The Courtroom Clerk calls all of the cases on the calendar to find out who is present.

Please answer **LOUDLY** when your case is called. After the Clerk finishes the calendar call, you are asked to form a line at his/her desk for any questions that you might have.

If you are **SUING** and the other party is not there, you must still show proof of your claim before you can get a judgment in your favor.

If you are **BEING SUED** and the other party is not there, ask that the case against you be dismissed (so you will win the case).

3. **SETTLEMENT**—You and the other party may want to **SETTLE THE CLAIM** before court actually begins. This means that the two of you reach an agreement between you before the case is heard by the Judge. You may do this **ON OR BEFORE** your court date.

Trained mediators are available each day that the court is in session to help you reach a settlement. Before your case goes to trial, the Courtroom Clerk will assign a mediator to meet with you and the other party. Any agreement you reach with the mediator's assistance will become part of the court record. Anything you discuss with the mediator will, however, remain confidential. If you are unable to settle your case with the help of a mediator, you may go on to trial.

IF YOU ARE BEING SUED, your opponent or his/her lawyer will look for you or call your name after the Clerk finishes the roll call. **BE SURE YOU KNOW WITH WHOM YOU ARE TALKING.**

IF YOU ARE SUING and want to settle, look for your opponent and talk with him/her about an agreement. If you want to settle, be ready to consider accepting a **SMALLER AMOUNT** than you are suing for **IF THE AMOUNT IS REASONABLE**. Settling a lawsuit is frequently the easiest way to save time and trouble.

If an agreement is reached in your case, a form called a "praecipe" will be given to you for setting forth the terms of the agreement.

Give the praecipe (agreement) to the Clerk and ask the Clerk if there is anything further that the Court must do with regard to the settlement.

4. **THE HEARING**—If you cannot or do not want to settle with the opposing party, you will have a hearing before the Judge.

Tell the Clerk that you could not settle, and wait for your case to be called again. At that time say, "Ready for trial."

If you are suing, you will have the first chance to present evidence and explain why you are suing. You have the responsibility of proving that the amount of money claimed is owed to you by the defendant.

If you are the one being sued, you will have a chance to **QUESTION** your opponent and his/her witnesses (cross examination). **THE PURPOSE OF YOUR QUESTIONS SHOULD BE TO SHOW THAT YOUR OPPONENT'S CASE DOES NOT "HOLD WATER."** Then you will have a chance to tell your side, have your witnesses testify, and present evidence. The plaintiff may then ask questions of you and your witnesses.

5. After the Judge has heard all of the testimony, he/she will inform the parties of his/her decision as to which party has won the case and the amount of the judgment, if an amount of money is awarded. There are times when the Judge will not render a decision immediately after the trial; if so, you will be notified by mail.

IF I WIN, HOW DO I COLLECT MY MONEY?

1. Ask the Judge to order the **ENTIRE** amount you have won to be paid in a single payment.
If the losing party cannot pay this amount, the Judge may arrange a monthly or weekly payment schedule agreement.
2. If you won the case by **DEFAULT JUDGMENT** (because your opponent did not appear in court), ask the Courtroom Clerk for the file

and take it to the Clerk's Office to order a **CERTIFIED COPY** of the judgment. The certified copy of the judgment will be mailed to you. If you receive payment of the judgment, mail the lower portion of the certified copy of judgment to the Clerk's Office. This will notify the Clerk that the judgment has been paid and the case closed. The fee for a certified copy of judgment is \$2.00.

3. If you do not receive your money within a reasonable time, call the Clerk's Office to seek information on how to collect.

It is not the duty or function of the Court to pay or collect what is owed to you. **IT IS YOUR RESPONSIBILITY TO TAKE ALL THE LEGAL ACTIONS NECESSARY TO COLLECT ON YOUR JUDGMENT.**

If you know that the losing party has a bank account in the District of Columbia or is employed in the District of Columbia, you may issue a **WRIT OF ATTACHMENT** on the losing party's bank account or to his/her place of employment. Attachment forms are available to you in the Clerk's Office. There is a Court fee of \$10.00.

4. If you do not know of any assets of the losing party, visit the Small Claims Clerk's Office. The Clerk will assist you in issuing a subpoena to the losing party to appear in court for an **ORAL EXAMINATION** as to the whereabouts of his/her assets. The fee is \$5.00.

MAY I DO ANYTHING IF I LOSE?

1. Remember that you may lose a case by default simply because **YOU ARE NOT PRESENT** on the hearing date. If you are notified that you have a Default Judgment against you, or your case has been dismissed, **YOU MAY STILL HAVE A WAY OUT.** Ask yourself these questions:

WAS I NOTIFIED OF THE HEARING DATE OF MY TRIAL?

DID I HAVE A GOOD REASON OR EXCUSE FOR NOT APPEARING IN COURT?

NOTE: The wages of government employees are not attachable.

If you did not know about the hearing date or had a good reason for not appearing, notify the Clerk right away. You will need to file a MOTION TO VACATE the Default Judgment or a MOTION TO REINSTATE the case if it was dismissed. The fee is \$5.00.

A hearing date will be set to hear your arguments as to why the decision should be set aside. If your motion is granted by the Court, the case is reopened and you will have an opportunity to have a trial before the Judge.

2. If you lost your case in a Small Claims Court hearing, YOU MAY TRY TO GET A NEW TRIAL OR YOU MAY REQUEST THAT THE JUDGMENT BE "STAYED" (NOT IMMEDIATELY EXECUTED) BECAUSE YOU ARE GOING TO APPEAL. A motion for a new trial is filed with the judge that heard the trial. You may file your motion for a new trial in the Clerk's Office for forwarding to the trial Judge.
3. You may APPEAL the Judge's decision to the D.C. Court of Appeals. If you decide to appeal, you have three business days from the date of the Judge's decision to file an application. The applications are in the Small Claims Clerk's Office. After you have completed the application forms, a clerk will direct you to the D.C. Court of Appeals Clerk's Office for filing of your appeals application. Appeals from the Small Claims Court are not automatic. The Court of Appeals will decide whether or not to consider your appeal.

REMEMBER, THE SMALL CLAIMS CLERK IS THERE TO HELP YOU. IF YOU HAVE A PROBLEM OR QUESTION ABOUT YOUR CASE, CALL HIM/HER. ALWAYS GIVE HIM/HER YOUR CASE NUMBER WHICH IS ON YOUR STATEMENT OF CLAIM.

NOTE: A VIDEO TAPE is available to further help you understand the procedures for filing a claim in Small Claims Court. You may view this nine-minute film in the Small Claims Clerk's Office, Room JM-260.

Superior Court of the District of Columbia



Multi-Door Dispute Resolution Division

Alternative Dispute Resolution Programs

1993

Melinda Ostermeyer, Director

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HISTORY

During a presentation at the 1976 Pound Conference about public dissatisfaction with the justice system, Harvard Professor Frank E.A. Sander offered an innovative approach that could ease the growing demands on courts throughout the country. Calling his concept the *multi-door courthouse*, Professor Sander envisioned one large courthouse with multiple dispute resolution *doors* or programs. Cases could be diagnosed and referred through the appropriate door. The programs could be located inside or outside of the courthouse, and could include, but would not be limited to, litigation, conciliation, mediation, arbitration, and social and governmental services.

After a careful study of the multi-door concept, the American Bar Association's Standing Committee on Dispute Resolution identified three experimental program sites: Tulsa, Oklahoma; Houston, Texas; and the Superior Court in Washington, D. C. . The American Bar Association hoped to determine if the multi-door concept would improve the administration of justice. The goals of the multi-door experiment were to provide easy access to justice, to establish networks that would reduce or eliminate citizen frustration, and to develop and improve programs to fill service gaps, thereby making available more *doors* through which disputes could be resolved.

The experimental program in the D.C. Superior Court was established in 1985. Four years later, in February 1989, Chief Judge Fred B. Ugast declared the experiment a success and designated the program as a full operating Division of the Court.

In 1985, the Intake and Referral Center was the first multi-door program established in the Superior Court. Trained staff and volunteers are available through this program to assist residents of the District of Columbia metropolitan area to consider options for resolution of their disputes. If the Intake Specialist is unable to conciliate the dispute, the citizen will be referred to an appropriate legal, social service or dispute resolution organization.

In the same year, the small claims mediation program became the first of the multiple *doors*. Daily, volunteers are available in the Small Claims Court to help parties reach a mutually satisfactory solution to disputed claims under \$2,000. Additionally, in 1991 small claims mediators began to mediate collection cases with claims of \$25,000 or less. Approximately 50% of the cases entering mediation are resolved with the help of a neutral third party.

The domestic relations mediation program began operation late in 1985. Initially, cases entering domestic relations mediation came to the program on a voluntary basis and involved issues of child support, custody, visitation, spousal support and property division. Mediation continues to be available prior to filing a formal complaint in Court, or at anytime after filing a complaint, even on the day of trial or at the hearing. Tax and pension issues are also mediated by specially trained domestic relations mediators. Cases ineligible for mediation are those involving the use of weapons, serious injury by one party to the other, a long history of repetitive violence, child abuse, or a lack of parity in bargaining power between the parties.

Court-annexed, non-binding arbitration was initiated in 1987 through a grant from the National Institute for Dispute Resolution and the Meyer Foundation. Approximately 400 cases filed in the Civil Division were randomly assigned to arbitration during a two-phase experimental period between 1989 and 1991. The Court's Research and Development Division compared arbitrated cases with a control group of similar cases which were litigated. At that time, approximately 75% of the cases arbitrated were dismissed or otherwise disposed of within 120 days, as compared with 10% of the litigated cases. In addition, litigants surveyed responded favorably to the concept of court-ordered arbitration.

In a continuing effort to educate the legal community about ADR techniques and to reduce the number of the Court's oldest pending civil cases, another successful ADR experiment was initiated by the Court. For one week each year from 1987 through 1989, Chief Judge Fred B. Ugast ordered all civil trials suspended for the one week designated as Settlement Week.

During that time, trained judges and volunteer attorneys from local bar associations held mediated settlement conferences for approximately 700 to 900 of the oldest civil cases. Cases commonly mediated during Settlement Week included contracts and tort claims ranging in value from \$469 to \$1.8 billion; the largest category of cases were valued between \$100,000 and \$500,000. Between 43%-50% of cases ordered into settlement conferences settled.

The success of Settlement Week encouraged the Court to make mediation available to civil litigants year-round, including for the most complex cases. At the request of either party, the Court ordered all parties to participate in at least one mediation session. Fifty-three percent of these cases were resolved through mediation.

In late 1989, Chief Judge Ugast appointed a task force to plan and oversee the implementation of a comprehensive Civil Delay Reduction Program. The Court anticipated that this program would bring civil case processing in the Superior Court into compliance with the ABA's guidelines for timely disposition of civil cases. The Civil Delay Reduction Program includes the use of automated case processing, individual calendar assignments, differentiated case management, and incorporates it in the use of mediation, arbitration and neutral case evaluation in the civil case processing system.

To assist with the conversion to the Civil Delay Reduction Program, the Multi-Door Division mediated approximately 3,100 of the oldest civil cases between October 1989 and January 1991, and resolved approximately half of these cases. When the Civil Delay Reduction Program became operational in January of 1991, the Division made available mediation, neutral case evaluation, and binding and non-binding arbitration for most civil cases filed in the Court. The Division analyzes civil cases after they are filed to determine the most appropriate ADR technique. It is anticipated that annually approximately 5,500 civil cases will be referred to dispute resolution by the judge during the initial scheduling conference held between the judge and counsel. The initial scheduling conference is held 90-120 days from filing.

Furthermore, the presiding judge of the Probate Division refers probate and tax assessment matters to the Multi-Door Division. Civil mediators have helped to settle more than 70% of the cases referred.

In order to provide comprehensive ADR services, the Division has developed extensive training and educational programs for its over 600 volunteers. The Division has set in place numerous "quality control" mechanisms, such as user surveys, mentorships, and individual evaluations.

In addition, the Court's national reputation as having one of the most comprehensive court-based ADR programs is confirmed by the continuous requests from other states and other countries for technical assistance in establishing similar ADR programs.

The Present

Today, the Multi-Door Dispute Resolution Division maintains a staff of 19 full-time employees to administer its recruitment and training programs, intake and referral program, small claims mediation program, domestic relations mediation program, probate mediation program, tax assessment mediation program and civil case classification, mediation, arbitration and case evaluation programs. The Division provided citizens with a neutral forum to consider the settlement of their dispute in almost 7,400 cases in 1992. In addition, over one thousand citizens were assisted through the Division's intake and referral program.

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